IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

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SUPREME COURT, U.S.

VINCENT ANTHONY BUSH,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. ____

VINCENT ANTHONY BUSH,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Petitioner moves that the Court grant a writ of certiorari to review the judgment of the District Court of Appeal, First District of Florida, dated February 27, 1978, and reported in 355 So.2d 488. A copy of this decision is included in the record submitted in support of this petition at pages 1 and 2.

Other documents in the record will be designated in this petition by the abbreviation "R" followed by the appropriate page number.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The grounds for asserting jurisdiction are that the petitioner was convicted and sentenced for the offense of robbery by the State of Florida on the

basis of evidence derived, in part, from an illegal seizure of his person in violation of the Fourth Amendment to the United States Constitution made applicable to the stafes by the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081 (1961).

The judgment of the District Court of Appeal sought to be reviewed was entered on February 27, 1978. A timely notice of certiorari was filed in the Florida Supreme Court on March 23, 1978 (R-3). Certiorari was denied on jurisdictional grounds by the Florida Supreme Court June 30, 1978 (R-4).

QUESTION PRESENTED

WHETHER THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICERS TO ARREST SUSPECTS IN THEIR HOMES WHEN NO WARRANT HAS BEEN OBTAINED AND THERE ARE NO EXIGENT CIRCUMSTANCES DEMONSTRATED EXCUSING THE ABSENCE OF AN ARREST WARRANT.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The petitioner was charged with robbery in the Circuit Court of Duval County, Florida (R-5). Prior to trial a

motion and an amended motion were filed seeking to suppress a written statement given by petitioner to law enforcement officers (R-6-8). The amended motion alleged in part as follows:

> "[A]nd for grounds for said Motion would show that the Defendant was arrested on January 11th, 1977, without a warrant at approximately 9:30 O'Clock A.M., that morning. That he was asleep in his home when officers entered and on being awakened, there were two (2) officers of the Jacksonville Sheriff's Office with guns pointed directly at his head at a distance of less than two yards. That he was taken from his home to the Duval County Jail by these and other officers and at 1:20 O'Clock P.M., that afternoon, signed a statement which was written for him by one of the officers who had been questioning him.
>
> 1. The statement was illegally obtained without a warrant.
>
> 2. There was no probable cause for his arrest.
>
> 3. The officers should have taken him to a magistrate or other judicial officer.
>
> 4. There was no crime committed in the presence of the officers nor did they have probable cause to believe that the Defendant had committed a crime.
>
> 5. Said arrest and written statement was unlawful, void and in violation of Defendant's constitutional and legal rights." (R-7,8).

At the hearing on the motion to suppress Deputy J.W. Terry testified that he was told by Detective Kearney that the petitioner had been involved in the Heart of Jacksonville Hotel robbery (R-13). Kearney's information had come from another participant in the robbery, Johnny Winters (R-33-38). At approximately 10:30 a.m. on January 11, 1977, Detectives Terry, Kearney, and Bradley went to the petitioner's house to arrest him. They knocked on the door, were admitted to the

home, and found the petitioner asleep on a sofa. At a distance of approximately three feet from petitioner, the officers drew their guns, pointed them at petitioner and arrested him. Petitioner was taken immediately to the Sheriff's Office and gave the incriminating statement sought to be suppressed.

The officers making the arrest did not have a warrant and had not attempted to obtain one. When asked why an arrest warrant had not been sought Detective Terry said:

> "I don't know, Mr. Reese. It's like I stated before, I had just received this information possibly a day or so before and due to the lack of leads that I had at the time working the robbery, I had suspended the case and at this time due to the information that had been received by Detective Kearney and Bradley, they reopened the case and I don't know why they did not request a warrant. I don't know that they didn't." (R-34).

The petitioner testified that he had been at home asleep when the officers woke him. Their guns were pointed at him. Petitioner was told he was under arrest for robbery and murder.

One of the grounds asserted by petitioner's counsel in support of the motion to suppress was that the officers

> "Had a chance to get a -- to go before a Court and get a warrant which they did not do. . . ." (R-40).

The trial judge denied the motion to suppress and the statement was ruled admissible (R-53,55).

The petitioner was convicted and sentenced (R-56).

In the District Court of Appeal the petitioner presented the Fourth Amendment issue as follows:

> "WHETHER THE TRIAL JUDGE SHOULD HAVE SUPPRESSED THE APPELLANT'S [PETITIONER'S] CONFESSION BECAUSE

> IT WAS THE RESULT OF AN ARREST OF THE APPELLANT [PETITIONER] IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT" (R-57).

In support of this point it was argued that petitioner's confession had been made within two hours of his arrest and was the direct result of unconstitutional custody; the warrantless arrest of the petitioner in his home was claimed to have violated his right to be secure in his person and in his home against unreasonable seizures as guaranteed by both the Fourth Amendment to the United States Constitution and by Art. I, § 12 of the Florida Constitution. It was also urged that the taint of the illegal custody had not been dissipated by any intervening cause, since the giving of warnings prescribed by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966), do not automatically break the chain of illegal custody. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975); Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676 (1969).

In the District Court brief petitioner recognized that the Florida Supreme Court had refused to anticipate a ruling by this Court that warrantless arrests in the home might violate privacy interests protected by the Fourth Amendment and had therefore held that a warrantless arrest of a suspect in his home was lawful under § 901.15(3), Fla. Stat. (1975), in State v. Perez, 277 So.2d 778 (Fla. 1973), cert. den. 414 U.S. 1064.

Despite Perez, petitioner argued that the Fourth Amendment ultimately would be interpreted as prohibiting warrantless arrests of a suspect who was within the protected area of the privacy of his home in the absence of a showing of exigent circumstances to justify a warrantless arrest. Petitioner relied upon the decisions of this Court which had construed the Fourth Amendment to hold that the

Warrant Clause requires obtaining of a search warrant for premises even though probable cause unquestionably exists. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145 (1925); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Jones v. United States, 357 U.S. 493, 2 L.Ed.2d 1514 (1958).

Petitioner also relied upon the trend of decisions protecting privacy interests with the Warrant Clause when there was a reasonable expectation of privacy, especially in the home. Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967); Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970); Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542 (1969); see, Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971); United States v. Chadwick, 53 U.S. 538, 53 L.Ed.2d 538 (1977); United States v. United States District Court, 407 U.S. 297, 32 L.Ed.2d 752 (1972).

Petitioner also argued that the validity of warrantless arrests in the home had been reserved in prior decisions but that when the Court would decide that issue it would be resolved in favor of the citizen rather than the state. Jones v. United States, supra, 357 U.S. 493, 2 L.Ed.2d 1514; Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564; Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975); United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976); United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300 (1976).

The resolution of this issue by the District Court of Appeal was based on the Florida Supreme Court decision in State v. Perez, supra, 277 So.2d 778, which held that as a matter of state law a warrantless arrest in the home was valid even without a showing of exigent circumstances. (Petitioner's brief on this point in the First District Court of Appeal is made a part of the record accompanying this petition at pages 57 through 81).

The Florida Supreme Court refused to consider petitioner's request for certiorari review, finding that it lacked jurisdiction (R-4). The cause is here to review the decision of the First District Court, finding that it was not necessary to either obtain a warrant or demonstrate exigent circumstances for the arrest of petitioner in his home.

REASONS FOR GRANTING THE WRIT

THE ISSUE OF WARRANTLESS ARRESTS WITHOUT EXIGENT CIRCUMSTANCES IN NON-PUBLIC PLACES HAS BEEN EXPRESSLY RESERVED BY THIS COURT AND HAS GENERATED CONSIDERABLE CONFUSION AMONG STATE AND FEDERAL COURTS. PETITIONER'S CASE PRESENTS THIS VITAL FOURTH AMENDMENT QUESTION IN A STRAIGHT-FORWARD MANNER CAPABLE OF DECISIVE RESOLUTION.

The facts of the petitioner's arrest are virtually uncontradicted. The officers had talked with an alleged perpetrator of the crime who confessed his involvement and implicated the petitioner. This information was learned by the officers at least one day prior to the arrest. No effort was made to obtain an arrest warrant. The officers went to the petitioner's home where several persons were present, they entered the home after identifying themselves, they found the petitioner asleep on a sofa, they woke him with guns drawn, and then placed him under arrest.

The petitioner's counsel challenged the admissibility of the statement obtained two hours after the arrest by appropriate pre-trial motion and by argument at the hearing. The State offered no evidence that a warrant had been obtained and no justification for the failure to seek a warrant.

Petitioner contends that his confession, made within two hours of his arrest, was the direct result of unconstitutional custody and the trial judge erred in failing to

suppress it. Brown v. Illinois, supra, 422 U.S. 590, 45 L.Ed.2d 416. The custody was unconstitutional because the warrantless arrest of the petitioner in his home violated his right to be secure in his person and in his home against unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution made applicable to the states by the Fourteenth. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081 (1961).

The issue is whether a warrantless arrest in the home violates privacy interests protected by the prohibition against unreasonable searches and seizures. There has never been a resolution of that issue by this Court. The Florida Supreme Court has held that a warrantless arrest of a suspect in his home is lawful pursuant to § 901.15(3), Fla. Stat. (1975). State v. Perez, 277 So.2d 778 (Fla. 1973), cert. den. 414 U.S. 1064.

This Court has construed the Fourth Amendment to mean that the Warrant Clause requires a search warrant prior to law enforcement agents searching premises even though probable cause unquestionably exists. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145 (1925); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Jones v. United States, 357 U.S. 493, 2 L.Ed.2d 1514 (1958). Exceptions to the requirement of a warrant for searching premises are limited to "only a few specifically established and well-delineated exceptions". Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967).

Petitioner here presents the question whether a warrant should likewise be required, or an exigency demonstrated, when a person is arrested in his home. This issue was mentioned, but not decided, in Jones v. United States, supra, 357 U.S. 493, 499, 500, 2 L.Ed.2d 1514, 1519, when the Court responded to the govern-

ment's argument that federal officers had the right to arrest a suspect upon probable cause in his home without a warrant and said:

> "These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment. But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government." (Emphasis added).

This same issue was again addressed, but not decided, in a portion of the majority opinion in Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971). Justice Stewart noted in Coolidge that it had been argued in dissent that police have the right to arrest upon probable cause without a warrant and without demonstrating exigent circumstances and said:

> "If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution. Indeed, if Mr. Justice White is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption.
>
> * * *
>
> None of the cases cited by Mr. Justice White disposes of this 'grave constitutional question.' The case of Warden v Hayden, supra,

where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. See also Davis v Mississippi, 394 US 721, 728, 22 L Ed 2d 676, 681, 89 S Ct 1394; Wong Sun v United States, 371 US, at 481-482, 9 L Ed 2d, at 451." (Emphasis added) 403 U.S. at 480, 481, 29 L.Ed.2d at 591.

This Court again took up the issue of warrantless arrests in Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975), stating:

"Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v Ohio, supra, at 96, 13 L Ed 2d 142; Wong Sun v United States, 371 US 471, 479-482, 9 L Ed 2d 441, 83 S Ct 407 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." 420 U.S. at 113, 43 L.Ed.2d at 64, 65.

In a footnote to that passage, however, the Court distinguished the general question of warrantless arrests from the more specific issue present here of a warrantless arrest in the home and said:

"The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Gerstein v. Pugh, supra, 420 U.S. at 113, 43 L.Ed.2d at 65, fn. 13.

In United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976), five members of the Court held that a warrantless arrest was permissible, without exception, when the

arrest occurred in a public place. The limited scope of the holding in Watson is emphasized by this comment in the majority opinion:

"In the case before us the Court of Appeals relied heavily, but mistakenly, on Coolidge v New Hampshire, 403 US 443, 480-481, 29 L Ed 2d 564, 91 S Ct 2022 (1971), for as we noted in Gerstein v Pugh, 420 US, at 113 n 13, 43 L Ed 2d 54, 95 S Ct 854, the still unsettled question posed in that part of the Coolidge opinion was 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' Watson's midday public arrest does not present that question." (Emphasis added) 423 U.S. at 418, 46 L.Ed.2d at 605.

Although concurring in the majority opinion, Justice Powell took care to comment on what was not included in the decision, saying:

"[W]e do not today consider or decide whether or under what circumstances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." 423 U.S. at 432, 433, 46 L.Ed.2d at 614.

Justice Stewart noted in a concurring opinion that since the arrest in Watson was made with probable cause "in a public place in broad daylight" the Court did not decide "whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest." 423 U.S. at 433, 46 L.Ed.2d at 614.

Justices Marshall and Brennan dissented and Justice Stevens did not participate.

The most recent pronouncement by this Court on this issue again left open the question whether a warrant is required to make an arrest of a suspect at home in the absence of exigent circumstances. United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300 (1976). Seven justices joined

in the opinion holding that a warrant was not necessary under the facts presented. Again the Court reserved the question of a warrantless arrest of a suspect in his home saying:

> "While it may be true that under the common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy. 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.' Katz v United States 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Hester v United States, 265 US 57, 59, 68 L Ed 898, 44 S Ct 445 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in Watson." (Emphasis added) 427 U.S. at 42, 49 L.Ed.2d at 305.

There were concurring and dissenting opinions, emphasizing the still undecided status of warrantless arrests made in the home. Justice Stewart joined the concurring opinion of Justice Stevens, who pointed out that the arrest was justified because of either exigent circumstances or harmless error. Significant was the appearance of Ms. Santana in the doorway of her home, an area not considered within the ambit of reasonable expectation of privacy. United States v. Santana, supra, 427 U.S. at 44, 45, 49 L.Ed.2d at 306 (Stevens, J., concurring).

Justice Brennan joined Justice Marshall's dissent, reiterating the protest to the Court's earlier blanket acceptance of warrantless arrests in public places announced in Watson. United States v. Santana, supra, 427

U.S. at 45-49, 49 L.Ed.2d at 306-309 (Marshall, J., dissenting).

Therefore, it appears that the Court has not reached a majority decision on the right of police to make a warrantless arrest of a suspect in his home absent a showing of exigent circumstances. Of the five justices who concurred in the majority opinion in Watson, only Justice White has consistently maintained a position allowing all arrests to be warrantless. Chimel v. California, 395 U.S. 752, 770-783, 23 L.Ed.2d 685, 698-706 (1969) (White, J., dissenting); Coolidge v. New Hampshire, supra, 403 U.S. at 511-512, fn.1,29 L.Ed.2d at 609-610. (White, J., concurring and dissenting). Justices Marshall and Brennan (as noted in dissents registered in Watson and Santana) have consistently taken the contrary position. Justice Stewart has expressed serious doubts about the validity of warrantless arrests in the home, Coolidge v. New Hampshire, supra, 403 U.S. at 480-481, 29 L.Ed.2d at 591, and made clear that the issue was not before the Court in either Watson or Santana. Justice Stevens announced a position of neutrality on this point in Santana (and took no part in Watson). Justice Powell has likewise taken care to note specifically that the issue was not being decided by Watson. Justices Blackmun, Rehnquist, and the Chief Justice joined the majority opinions in both Watson and Santana, in which the question was reserved, but have not otherwise expressed a preference.

It seems unquestioned, therefore, that eventually this Court will have to decide if the Warrant Clause applies to arrests in the home. Petitioner submits that this case presents the opportunity to make that choice.

By the momentum of prior decisions, and out of respect for the legitimate privacy interests of the

citizenry, this Court should require police to obtain warrants when making arrests in a home, absent exigent circumstances. The Warrant Clause should apply in the same fashion as if it were to be a search of other protected areas of privacy. Compare, e.g., Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967)(warrant required to intercept private telephone conversations made from a telephone booth); United States v. United States District Court, 407 U.S. 297, 32 L.Ed.2d 752 (1972)(warrant required for electronic surveillance of conversations even though the purpose was "national security"); Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970)(warrant required for search of home); Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564 (warrant required to search car on private property); United States v. Chadwick, 433 U.S. 1 , 53 L.Ed.2d 538 (1977)(warrant required to search double locked footlocker seized at time of valid warrantless arrest); Marshall v. Barlow's Inc., ___ U.S. ___, 56 L.Ed.2d 305 (1978)(warrant required to search business premises for safety hazzards notwithstanding act of Congress authorizing warrantless searches); Michigan v. Tyler, ___ U.S. ___, 56 L.Ed.2d 486 (1978)(warrant required to reenter and search arson scene after original phases of investigation terminated); Mincey v. Arizona, ___ U.S. ___, no. 77-5353 (June 21, 1978)(rejecting an automatic exigency based on an asserted "murder scene exception" to the warrant requirement); c.f., Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542 (1969)(the State has no power to seize obscene material from the privacy of the home); with, e.g., Carroll v. United States, 267 U.S. 132, 69 L.Ed.2d 543 (1925)(warrant not required to seize contraband from moving vehicle); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419 (1970)(warrant not required to search vehicle at police

station after its seizure on the highway, a decision which did not obviate the necessity for a warrant to search the more privately held possession of a footlocker seized under similar circumstances in Chadwick); Cardwell v. Lewis, 417 U.S. 583, 41 L.Ed.2d 325 (1974)(warrant not required to search exterior of car parked on public property).

It is evident from this comparison that as the expectation of privacy increases, there is a corresponding increase in the need to apply the Warrant Clause as an adjunct to probable cause by requiring advance judicial permission for the intrusion.

Moreover, the explicit language of the Court in prior decisions evinces a recognizable tendency to offer greater protection from police interference to persons in their homes and other private areas (as opposed to more public places) by the insulation of the Warrant Clause.

For example, in Agnello v. United States, 269 U.S. 20, 33, 70 L.Ed. 145 (1925), the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

In Cooper v. California, 386 U.S. 58, 59, 17 L.Ed.2d 730, 731 (1967), the Court said:

> "Searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in the search of a home, a store, or other fixed piece of property."

In United States v. United States District Court, supra, 407 U.S. 297, 32 L.Ed.2d 752, the Court stressed the importance of the Warrant Clause in these terms:

"Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause. Some have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' United States v Rabinowitz, 399 US 56, 66, 94 L Ed 653, 660, 70 S Ct 430 (1950). This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather, it has been 'a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.'" (Emphasis added) Id. at 765. (Footnote omitted).

* * *

"The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. Katz v United States, supra, at 359-360, 19 L Ed 2d at 586, 587 (Douglas, J., concurring). But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." (Emphasis added) (Footnotes omitted) Id. at 766.

* * *

"It is true that there have been some exceptions to the warrant requirement. Chimel v California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969); Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968); McDonald v United States, 335 US 451, 93 L Ed 153, 69 S Ct 191 (1948); Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). But those exceptions are few in number and carefully delineated, Katz, supra, at 357, 19 L Ed 2d at 585; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' Terry v Ohio, supra, at 20, 20 L Ed 2d at 905; Chimel v. California, supra, at 762, 23 L Ed 2d at 693." (Emphasis added) Id. at 767.

In Cardwell v. Lewis, supra, 417 U.S. 583, 41 L.Ed.2d 325, the Court again noted the priority of privacy as a key to the warrant requirement, saying:

"Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Id., at 305-306, 65 L Ed 647. And it had been said earlier, 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.'" Id. at 334.

* * *

"At least since Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles." Id. at 334.

* * *

"There is still another distin-

guishing factor. 'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' Almeida-Sanchez v United States, 413 US 266, 279, 37 L Ed 2d 596, 93 S Ct 2535 (1973)(Powell, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Id. at 335 (Emphasis added).

In South Dakota v. Opperman, 428 U.S. 364, 367, 368, 49 L.Ed.2d 1000, 1004 (1976), the Court said:

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are 'effects' and thus within the reach of the Fourth Amendment, Cady v Dombrowski, 413 US 433, 439, 37 L Ed 2d 706, 93 S Ct 2523 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.

* * *

Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." (Footnotes omitted).

Therefore, although the point has not been explicitly decided by the Court, petitioner contends that he was protected by the Fourth Amendment from being arrested in his home by police who failed to obtain a warrant or explain why they did not. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." United States v. United States District Court, supra, 407 U.S. at 313, 32 L.Ed.2d at 764. The twin concepts stressed in Katz v. United States, supra, 389 U.S. 349, 19 L.Ed.2d 576, that the Amendment protects people not places and that it applies when there is a

reasonable expectation of privacy, coalesce to shield petitioner from the unilateral action taken by the police here.

A better example of abuse could hardly be imagined as the officers here, acting only on hearsay from an accomplice, invaded a private dwelling, awakened the sleeping petitioner with drawn guns, and spirited him away for questioning without bothering first to seek the authority and neutral judgment of a magistrate. This bypassing of the judiciary when making such a substantial assault on the privacy of a person in his home is intolerable, and should be found to violate the right to be free from unreasonable searches and seizures.

To underscore the need for a warrant here, it is significant that after the arrest the police first brought the petitioner to the Sheriff's Office for questioning, rather than bringing him directly to a magistrate for the determination of probable cause and the advisement of rights. This action undercuts the assumption made in Chimel v. California, supra, 395 U.S. 752, 23 L.Ed.2d 685, by Mr. Justice White in arguing that warrants were unnecessary when he said that a warrantless arrest "demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into" and that the arrested person would be provided "almost immediately with a lawyer and a judge". Id. at 782, 783, 23 L.Ed.2d at 705, 706.

Furthermore, the absence of prior judicial approval for the arrest here casts serious doubt on whether the police really had probable cause. The only evidence against petitioner at trial was his own confession. The supposed "informer" took the Fifth Amendment at trial (R-54).

Under these circumstances it is virtually impossible to assess after the fact the actual information, and the indicia of its reliability, known by the police prior to petitioner's arrest and confession. The floundering testimony of Officer Terry in explaining the facts known by him and other officers highlights the need for judicial determination of probable cause before, and not after, the arrest. In Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed.2d 142, 147 (1964), the Court commented on this same point, saying:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

Because the police in the case now before the Court failed to obtain prior judicial approval before arresting petitioner in his home, when there was no showing of an excuse for not obtaining an arrest warrant, the arrest was invalid under the Fourth Amendment. Petitioner's confession was the direct result of this unconstitutional arrest and should have been suppressed.

Finally, petitioner urges this Court to accept jurisdiction because of the importance of the issue and the need for its authoritative resolution. Several circuit court of appeals' opinions have favored the rule that warrants should be required for arrests in non-public areas. E.g., United States v. Reed, 572 Fed.2d 412 (2d Cir. 1978); United States v. Killebrew, 560 Fed.2d 729 (6th Cir. 1977); Dorman v. United States, 435 Fed.2d 385 (D.C. Cir. 1970) (en banc). The New York Court of Appeals recently has taken a contrary position, thus engendering conflict between the state and federal courts within the jurisdiction of the Second Circuit. People v. Payton, ____ NE2d ____,

N.Y. Ct. Appeals, case no. 259, July 11, 1978, 23 Cr. L. Rp. 2419. The Florida Supreme Court's decision in State v. Perez, supra, places this State's rule at odds with that being followed in some federal courts. With the passage of time other jurisdictions will have to decide the question, anticipating the inevitable ruling by this Court. Those jurisdictions not aligning themselves with the side ultimately to prevail will be affected adversely by adoption of a rule which overthrows theirs. Assuming that the rule adopted requires a warrant, reasonable arguments for retroactivity could be made, since the holding should certainly have been anticipated. Cf., Stovall v. Denno, 388 U.S. 293, 18 L.Ed.2d 1199 (1967). Some convictions might be lost because of the passage of time. To avoid the attendant detrimental consequences of uncertainty, this Court should take jurisdiction here to answer the question which has so often been reserved; whether a warrant is constitutionally required for the arrest of a suspect in his home, absent exigent circumstances.

Respectfully submitted,

MICHAEL J. MINERVA
Public Defender
Second Judicial Circuit
P.O. Box 671
Tallahassee, FL 32302

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

RECEIVED
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SUPREME COURT, U.S

VINCENT ANTHONY BUSH,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

RECORD IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MICHAEL J. MINERVA
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
P.O. BOX 671
TALLAHASSEE, FL 32302
COUNSEL FOR PETITIONER

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL
ROOM 1500
THE CAPITOL
TALLAHASSEE, FL 32304
COUNSEL FOR RESPONDENT

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FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1978

VINCENT ANTHONY BUSCH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. GG-445

Opinion filed February 27, 1978.

An Appeal from the Circuit Court of Duval County.
Dorothy H. Pate, Judge.

Michael J. Minerva, Public Defender, for Appellant.

Robert L. Shevin, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee.

McCORD, Chief Judge.

Appellant contends first that the trial judge should have suppressed his confession because it was the result of an arrest of appellant in his home without a warrant and with no showing by the state of exigent circumstances that would have excused the absence of an arrest warrant. The trial court was correct in denying appellant's motion to suppress. See State v. Perez, 277 So.2d 778 (Fla. 1973). Appellant next contends that the trial court erred by instructing the jury that he could be found guilty of robbery committed while carrying a firearm when the evidence conclusively established that the firearm was in the possession of appellant's accomplice and that the judgment and sentence for armed robbery are, therefore, not supported by the

evidence. Appellant cites Earnest v. State, ____ So.2d ____, Fla. Supreme Court Case No. 51,491, opinion filed August 31, 1977, rehearing denied December 6, 1977. There, the Supreme Court construed §775.087(2), Florida Statutes (1975), which provides that any person who is convicted of robbery and who had in his possession a firearm shall be sentenced to a minimum term of imprisonment of three years. The court held that the three-year minimum term under the statute applied only to physical possession of a firearm by a defendant rather than constructive possession. Here, as in Earnest, the appellant, who did not have a firearm, was convicted as an aider and abettor of the crime in which he participated--robbery in which the offender carried a firearm or other deadly weapon [§812.13(1) and (2)(a), Florida Statutes (1975)], rather than robbery in which the offender carried no firearm, deadly weapon, or other weapon [§812.13(1) and (2)(c), Florida Statutes (1975)]. Here, unlike in Earnest, appellant was not sentenced to minimum three-year term of imprisonment; thus, we are not concerned with §775.087(2).

The Supreme Court in Earnest did not in any way abrogate §777.011, Florida Statutes (1975), dealing with principals in the first degree. That statute provides that whoever aids, abets, counsels, hires or otherwise procures an offense to be committed and such offense is committed is a principal in the first degree and may be charged, convicted and punished as such whether he is or is not actually or constructively present at the commission of such offense. That statute makes an aider and abettor a principal in the first degree to the crime he aids and abets. Here, the evidence clearly shows that appellant was present aiding and abetting his accomplice in the accomplice's commission of the crime of robbery with a firearm. Thus, appellant is guilty as a principal in the first degree of that crime rather than the crime of robbery in which the offender carried no firearm, deadly weapon, or other weapon.

AFFIRMED.

BOYER, J., and McLANE, RALPH M., Associate Judge, CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

VINCENT ANTHONY BUSH, :
Petitioner, :
v. : DCA DOCKET NO. GG-445
STATE OF FLORIDA, : SUPREME COURT CASE NO. _____
Respondent. :

NOTICE

NOTICE IS HEREBY GIVEN that Vincent Anthony Bush, petitioner, invokes the certiorari jurisdiction of the Supreme Court to review the decision of this Court rendered February 27, 1978.

The decision is in direct conflict with a decision of the Supreme Court of Florida on the same question of law. Jurisdiction of the Florida Supreme Court is invoked pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iii).

Petitioner has been adjudged insolvent and is represented by appointed counsel.

Respectfully submitted,

MICHAEL J. MINERVA
Public Defender
Second Judicial Circuit

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to the petitioner, Mr. Vincent Anthony Bush, #054109, Cross City Correctional Institution, P.O. Box 1500, Cross City, FL, this 25th day of March, 1978.

MICHAEL J. MINERVA

IN THE SUPREME COURT OF FLORIDA
FRIDAY, JUNE 30, 1978

VINCENT ANTHONY BUSH, **
Petitioner, **
vs. **
STATE OF FLORIDA, **
Respondent. **

CASE NO. 53,689
District Court of Appeal,
First District
GG-445

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, C.J., ENGLAND, SUNDBERG and ALDERMAN, JJ., Concur
ADKINS, BOYD and HATCHETT, JJ., Dissent

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

cc: Hon. Raymond E. Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk
Hon. Dorothy H. Pate, Judge

Michael J. Minerva, Esquire
Raymond L. Marky, Esquire

JUL 7 - 1978

In The Circuit Court
of the Fourth Judicial Circuit of Florida
in and for
The County of Duval, State of Florida

Fall Term, seventy-six

STATE OF FLORIDA
vs

TONY RICHARD MILLER, and
VINCENT ANTHONY BUSCH, also known as
Vincent Anthony Bush

CASE NO: 77 233

DIVISION: S - CF

STATUTE NO: 812.13 & 775.087

INFORMATION FOR

ROBBERY

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA.

ED AUSTIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County charges that TONY RICHARD MILLER and VINCENT ANTHONY BUSCH, also known as Vincent Anthony Bush, on the 27th day of June, 1976, in the County of Duval and State of Florida, did by force, violence, assault or putting in fear, take away from the person or custody of MAE CATES, certain property, to-wit: money of the value of more than One Hundred Dollars ($100.00), the property of Dr. William Frank McNabola, trading and doing business as HEART OF JACKSONVILLE MOTOR HOTEL, INC., a corporation, and in the course of committing said Robbery, carried a firearm, to-wit: a pistol, and while perpetrating the offense or attempting to perpetrate the offense had in their possession a firearm or destructive device, to-wit: a pistol, contrary to the provisions of Sections 812.13 and 775.087, Florida Statutes.

STATE OF FLORIDA
COUNTY OF DUVAL
Personally appeared before me,

F. Joseph DuBray

Assistant State Attorney, for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, and that this prosecution is instituted in good faith and he/she certifies that testimony under oath has been received from the material witness(es) for the offense. Sworn to, and subscribed before me this 21st day of January 19 77

Barbara M. [illegible]

ED AUSTIN, STATE ATTORNEY
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY

By F. Joseph DuBray
Assistant State Attorney

S. MORGAN SLAUGHTER, Clerk of the Circuit Court, Fourth Judicial Circuit of Florida, in and For Duval County, and Clerk of the County Court, Duval County, Florida.

FILED THIS JAN 21 1977

BY DEPUTY CLERK [illegible]

MRW/rq
Dkt AD
Cap No Bnd
Ext. C S
S/W

TRM: 77-191-1 MORE
VAB: 77-858-1 MORE
TRM: 1/24/77
VAB: 1/24/77

R-6

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 77-289-CF
DIVISION: S-CF

STATE OF FLORIDA,

Plaintiff,

vs.

TONY RICHARD MILLER, and VINCENT ANTHONY BUSCH, Also Known As, VINCENT ANTHONY BUSH,

Defendants.

THIS INSTRUMENT IN COMPUTER

FILED
APR 19 1977
S. Morgan Slaughter
CLERK - CIRCUIT COURT

MOTION TO SUPPRESS

Comes now the Defendant, VINCENT ANTHONY BUSH, by and through his undersigned Attorney, and moves the Court to suppress the statement signed by the Defendant, VINCENT ANTHONY BUSH, on January 11th, 1977, and for grounds for said Motion would show that said statement is unconstitutional and was not freely and voluntarily given nor is the statement a complete and accurate resume of the statement of the Defendant, VINCENT ANTHONY BUSH.

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael R. Weatherby, Esquire, State Attorney's Office, Duval County Courthouse, Jacksonville, Florida, by Hand Delivery on this 19 day of April, 1977.

F. CLYDE REESE
Attorney for Defendant, Vincent Anthony Bush
137 E. Forsyth Street - Suite 316
Jacksonville, Florida 32202
Telephone: (904) 355-2931

R-7

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 77-289-CF
DIVISION: S-CF

STATE OF FLORIDA,

Plaintiff,

vs.

TONY RICHARD MILLER and VINCENT ANTHONY BUSCH, Also Known As, VINCENT ANTHONY BUSH,

Defendants.

THIS INSTRUMENT IN COMPUTER

FILED
APR 21 1977
S. Morgan Slaughter
CLERK - CIRCUIT COURT

AMENDED MOTION TO SUPPRESS

Comes now the Defendant, VINCENT ANTHONY BUSCH, Also Known As, VINCENT ANTHONY BUSH, by and through his undersigned Attorney, pursuant to the applicable Rules of Criminal Procedure and moves the Court to suppress the written statement and for grounds for said Motion would show that the Defendant was arrested on January 11th, 1977, without a warrant at approximately 9:30 O'Clock A.M., that morning. That he was asleep in his home when officers entered and on being wakened, there were two (2) officers of the Jacksonville Sheriff's Office with guns pointed directly at his head at a distance of less than two yards. That he was taken from his home to the Duval County Jail by these and other officers and at 1:20 O'Clock P.M., that afternoon, signed a statement which was written for him by one of the officers who had been questioning him.

1. The statement was illegally obtained without a warrant.

2. There was no probable cause for his arrest.

3. The officers should have taken him to a magistrate or other judicial officer.

4. There was no crime committed in the presence of the officers nor did they have probable cause to believe that the Defendant had committed a crime.

5. Said arrest and written statement was unlawful, void and in violation of Defendant's constitutional and legal rights.

F. CLYDE REESE
Attorney for Defendant,
Vincent Anthony Bush
137 E. Forsyth Street, Suite 316
Jacksonville, Florida 32202
Telephone: (04) 355-2931

I HEREBY CERTIFY that a copy of the foregoing Amended Motion to Suppress has been furnished to Michael Weatherby, Esquire, State Attorney's Office, Duval County Courthouse, Jacksonville, Florida, by Hand Delivery, on this 21 day of April, 1977.

F. CLYDE REESE
Attorney for Defendant,
Vincent Anthony Bush
137 E. Forsyth Street, Suite 316
Jacksonville, Florida 32202
Telephone: (904) 355-2931

THE COURT: All right, court will be in recess until 1:30.

(Noon recess.)

(Jury absent.)

THE COURT: Bring Mr. Busch out.

(Defendant present.)

THE COURT: The Jury was excused until 2:30 so I would not anticipate they would be back.

All right, Gentlemen, the Jury, of course, is in recess until 2:30 and at this time it would be appropriate to have the motion to suppress.

MR. REESE: I think so.

MR. WEATHERBY: I think that would be the thing to do at this time, yes, ma'am.

MR. REESE: Your Honor, we had a witness on the stand. It seems to me his testimony should be completed. I don't know what he is going to say, but subject to the Court's ruling, it seems to me we ought to finish it and have him testify or not.

MR. WEATHERBY: Well, we don't have a Jury at the moment, Judge.

MR. REESE: True, but I was going to

MARIE SPLANE
OFFICIAL COURT REPORTER
JACKSONVILLE, FLORIDA 32202

ask for a proffer on his testimony. I don't know if I have got the right to do it.

THE COURT: As to Mr. Winters?

MR. REESE: Yes, to see what he's going to testify to. There's such a conflict here, it seems to me, outside the province of the Jury that we ought to find out whether or not there was an agreement, what it was and all that kind of business.

MR. WEATHERBY: Your Honor, I don't intend to ask Mr. Winters any further questions, I don't think.

THE COURT: You don't intend to ask him any questions?

MR. WEATHERBY: Any further than what has transpired already, at this point, anyway.

THE COURT: All right, it would appear to the Court that the basis has been laid sufficient for the motion to suppress to be taken up at this time.

All right, Mr. Weatherby, on the motion to suppress do you have some evidence to present?

MR. WEATHERBY: Yes, Your Honor.

Detective Terry is here. Your Honor, Detective Terry has not been sworn, but I have advised him that the rule of secrecy has been invoked.

THE COURT: Fine.

I know that you are familiar with that rule, right?

MR. TERRY: Yes, ma'am.

THE COURT: Would you raise your right hand and be sworn by the Clerk?

(Witness sworn by Clerk.)

THE COURT: You may proceed.

MR. WEATHERBY: Thank you, Your Honor.

J. W. TERRY, JR.,

was called as a witness on behalf of the State, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. WEATHERBY:

Q Would you state your name and place of employment?

A J. W. Terry, Jr., employed by the Office of the Sheriff, Duval County.

Q And how long have you been so employed, sir?

A Approximately seven and a half years.

Q What is your present duty assignment, sir?

A Investigator in detective division.

Q Consistent with those duties, did you have occasion -- well, let me ask you this: Were you so employed in that division on or about the 11th of January, 1977, sir?

A Yes, sir, I was.

Q In what particular division were you assigned at that time?

A I was assigned to robbery detail.

Q On that date, Detective Terry, did you have occasion to come in contact with a one Vincent Anthony Busch?

A Yes, I did.

Q Do you see that person in the Courtroom today?

A Yes, sir.

Q Where is that person, sir? Would you describe what he's wearing?

A Sitting right at the table out there (indicating). He has on a white shirt.

MR. WEATHERBY: Could the record

reflect he has identified the defendant, Your Honor?

THE COURT: The record will so reflect.

BY MR. WEATHERBY:

Q What were the circumstances you first came into contact with Mr. Busch on that day, Detective Terry?

A I assisted Detective Kearney of robbery detail and Bradley of the homicide detail going to pick Mr. Busch up in the morning. I think it was in the late morning hours, 10:30, 11:00 o'clock, somewhere around there.

Q All right, sir. And where were you looking for Mr. Busch?

A I was advised by Detective Kearney that they had information that the defendant was involved in a robbery of the Heart of Jacksonville Motel.

Q And did you come in contact with Mr. Busch at that time?

A Yes, sir, I did.

Q Where was that, sir?

A He was at a residence. I don't recall the exact address without referring to a form that I had obtained from Mr. Busch later, but he was asleep on the couch in the living room and we arrested Mr. Busch

at this time. He was transported to the robbery office.

Q Would you describe the circumstances of the arrest, Detective Terry? What happened?

A What do you mean?

Q Well, what happened? You went to the house, you knocked on the door. What happened next?

A We went to the house. We identified ourselves. We were admitted to the house, went in -- I assume it was the living room.

Q Who answered the door?

A I don't recall who it was, sir. There was a number of people there in the house.

Q All right, sir. How did you identify yourselves?

A By showing our badges, told them that we were police officers from the Sheriff's Office.

Q Were you in uniform or in civilian clothing?

A We were in civilian clothes.

Q Did you have a uniformed officer with you?

A Yes, sir, we did. I'm not sure whether he was at the front door or not, but we went into the house and Mr. Busch was, like I say, asleep on the couch. We woke him up, advised him who we were, identified ourselves to him in the same manner,

advised him he was under arrest.

Q Did you at any time have occasion to use your weapons while at that residence?

A I believe the weapons were drawn.

Q Why was that?

A Well, due to the nature of the arrest. It was a serious felony.

Q Did you have occasion to return your weapons to the holsters?

A Yes, sir.

Q Approximately at what point?

A After we saw there would be no resistance to the arrest and which there wasn't. At this time Mr. Busch was taken to the -- or brought down to the Courthouse to the robbery office.

Q Did you place him in handcuffs?

A Yes, sir.

Q And how was he transported to the robbery office?

A I believe Detective Kearney and I transported him in our vehicle.

Q And at some point that morning -- do you remember approximately what time you arrived at the robbery office?

A It was shortly after 11:00 o'clock, sir.

Q And where is the robbery office, Detective Terry?

A It's on the fifth floor of the Courthouse.

Q Will you describe that office, sir?

A Yes, sir. You enter the main room and there are two other rooms. One is a room occupied by the supervisors, lieutenant and the sergeant, and the other is an interview room.

Q Approximately how large a room is it?

A The interview room?

Q Yes.

A I'd say approximately twelve by fifteen.

Q I'm sorry?

A Twelve by fifteen, approximately.

Q What is the nature of the light in that room, Detective Terry?

A It's average room lighting. The lights are in the ceiling. You have windows in the room.

Q Fluorescent or incandescent like we have in the Courtroom?

A Yes, sir.

Q All right. When you arrived in the Courthouse, did you go immediately to the robbery office with Mr. Busch?

A Yes, sir.

Q Did you make any stops on the way?

A No, sir.

Q When you got to that office -- well, let me ask you this: Did you accompany Mr. Busch?

A Detective Kearney and I both. I also believe Detective Bradley was present.

Q All right, sir. And you went to that office. During the trip from the residence where you apprehended Mr. Busch till the time you got to the Courthouse, were you in Mr. Busch's presence?

A Yes, sir.

Q I mean, did you ride in with him?

A Yes, sir, to the best of my knowledge, I believe that Detective Kearney and I transported him in our vehicle so we were with him all the time.

Q All right, sir. And the three of you then went up or came up to the robbery office after you got to the Courthouse, is that right?

A Yes, sir.

Q All right. What first transpired when you arrived at the interview room?

A Mr. Busch was advised of his constitutional rights, Miranda warnings, a standard rights form, and he admitted or he stated that he understood his rights, and the rights form was witnessed by myself,

Detective Kearney and Detective Bradley.

Q All right, sir. Was Mr. Busch still in handcuffs at this time?

A To the best of my knowledge, the handcuffs were removed once he was in the interview room.

Q All right. Detective Terry, you said you advised him of his rights using a particular form and that that was signed. What did you do with that form after Mr. Busch signed it?

A The form was placed in a case file that Detective Kearney had filed concerning the case.

Q All right, sir. Pursuant to instructions from me, did you have occasion to bring that form with you today?

A Yes, sir, I did.

Q Would you please produce it?

(Witness producing document.)

Q All right. This is the form that you utilized on the 11th of January?

A Yes, sir.

Q And what you just told the Court about?

A Yes, sir.

Q How do you know that this is the same form, sir?

A I recognize the form by my signature at the

bottom, Detective Kearney's signature in the middle, and Detective Bradley's signature as witnesses to the form.

Q All right. Will you please describe to the Court how the rights were administered or how Mr. Busch was advised of his rights, consistent with the use of this form?

A The rights were read from the form verbatim pursuant to the Miranda decisions and after each right was read to Mr. Busch, he was asked if he understood it.

Q All right. And did he indicate -- what was his response?

A He indicated he understood his rights.

Q All right. Would you please read for the record the statement there that you have?

A It's, "Your constitutional rights." It's, "place advised, robbery office." The date is the 11th, January, 1976. Time 11:40 a.m.

"You have the following rights under the United States Constitution. You don't have to make a statement or say anything. Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before you make a statement or before any

questions are asked of you and to have the lawyer with you during any questioning. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You may also stop the questioning at any time and consult with your appointed or privately employed lawyer."

The bottom of the rights form is, "Waiver of rights." It says, "I have read the above statement of my rights and understand the statement and understand what my rights are and I'm willing to make a statement and answer questions. I do not want to talk to a lawyer at this time. I have not been promised anything in exchange for a statement. I have not been threatened and there has been no pressure to get me to make a statement or answer questions." It's signed Vincent Anthony Busch. It's witnessed by Detective J. A. Bradley, Detective P. H. Kearney and Detective J. W. Terry.

Q And did you inquire if he understood those rights?

A Yes, sir.

Q And his response?

A That he did understand his rights.

Q Did he ever indicate to you that he wanted to talk to a lawyer?

A No, sir.

MR. WEATHERBY: Your Honor, the State would offer this into evidence as the State's Exhibit A.

THE COURT: A for identification?

MR. WEATHERBY: Yes, ma'am, if you would, A for identification.

THE COURT: All right, Mr. Reese, you are now looking at that exhibit?

MR. REESE: Yes, ma'am. Could I have just a moment?

THE COURT: Certainly.

(Mr. Reese examining document.)

MR. REESE: Your Honor, could I ask some questions of the witness? I would object to the introduction.

THE COURT: All right. This is marking only for identification at this time.

MR. REESE: I'm sorry.

THE COURT: This is a proffer at this stage of the trial. I believe Mr. Weatherby probably has a few more questions that he'd

like to ask.

MR. WEATHERBY: Yes.

BY MR. WEATHERBY:

Q Is that the form that Mr. Busch signed? Did he sign that form in your presence?

A Yes, sir.

Q All right. After you advised Mr. Busch of his constitutional rights by using that form, did you talk to him?

A Yes, sir.

Q Did he make any statements to you?

A Yes, sir. A short time later Mr. Busch gave a statement concerning the robbery which I wrote. It was not verbatim which was explained to Mr. Busch, that it would not be verbatim or word-for-word. After the statement was made, he looked at the statement and agreed basically with what was in the statement.

Q You read the statement to him?

A Yes, sir.

Q And you say he basically agreed with the facts in the statement?

A Yes.

Q All right. Where did you get those facts from, Detective Terry?

A Mr. Busch.

Q You had an oral conversation with him then relating to the robbery?

A Yes, sir.

Q And would you say that you substantially recorded in this statement the facts that he had given you, obviously not verbatim?

A Yes, sir.

Q It pretty well included everything that he had told you in the statement?

A Yes, sir.

Q Detective Terry, was anyone else present while Mr. Busch was giving this statement?

A Yes, sir, Detective Kearney was present.

Q Just the two of you then?

A Yes, sir.

Q During the time -- do I conclude that you were still in the robbery office?

A Yes, sir, in the interview room.

Q In the interview room?

A Yes, sir.

Q During the time that you and Detective Kearney were with Mr. Busch in the interview room, did you ever have occasion to draw your weapon?

A No, sir.

Q Did you ever observe Officer Kearney do that?

A No, sir.

Q During that time, did you ever have occasion to threaten Mr. Busch?

A No, sir.

Q Did you or did Detective Kearney while you were present?

A No, sir.

Q Either physically or verbally?

A No, sir.

Q Did you offer him any form of physical abuse?

A No, sir.

Q Did you offer him any hope of reward if he gave his statement?

A No, sir. We are not authorized to do that.

Q Did you promise him that you would recommend any light sentence to the State Attorney's Office or the Court if he gave a statement?

A No, sir. I think what was told to Mr. Busch is that we would tell the State Attorney or his attorney that he had cooperated, but we could not promise him anything.

Q Did you make any other kind of statements

like that to Mr. Busch?

A No, sir.

Q During the interview in this room, Detective Terry, did anyone else ever come in?

A To the best of my knowledge, they didn't.

Q Did Mr. Busch ever indicate an unwillingness to give you the statement once the interview had started?

A No, sir.

Q After you had -- let me ask you this: Why did you write the statement rather than him?

A It's just standard procedure. That's the only reason I did it.

Q But you did read the statement to him?

A Yes, sir.

Q After you read it, did you give him a chance to look at it?

A Yes, sir.

Q And did he make any comments?

A Except that it was basically what he said.

Q Did you give him an opportunity to sign it?

A Yes, sir.

Q And did anyone else sign that form?

A Did anyone else sign the form?

Q Yes.

A I witnessed the form and Detective Kearney also witnessed it.

Q He signed it in your presence then?

A Yes, sir.

Q What, if anything, happened to that statement after that date, sir?

A It was also put in the same case file as I mentioned before with the rights form.

Q All right. Did you have occasion to bring that today?

A Yes, sir, I did.

Q Pursuant to my instructions?

A Yes, sir.

Q Would you take it out, please?

(Witness producing document.)

Q You have a document here which appears to be handwritten on both sides. It's a one-page sheet. I ask you is there anything out of the ordinary that you recognize about this particular document that comes to your memory or how do you recognize it?

A Well, I recognize it by my handwriting and also by the fact that my signature is on the bottom of it as a witness and also that of Detective Kearney.

Q All right. And this is the same document that you took from Mr. Busch that day?

A Yes, sir.

Q All right. Would you please read the information that's at the top there in the text of that statement?

THE COURT: Mr. Reese, I assume you have received a copy of this statement?

MR. REESE: Yes.

MR. WEATHERBY: Oh, yes.

THE WITNESS: This is a standard statement form and the top of the statement is, "Name, Vincent Anthony Busch." Address is 834 East 6th Street.

BY MR. WEATHERBY:

Q Detective Terry, is that the address that you arrested Mr. Busch at?

A Yes, sir.

Q Please go on. I'm sorry.

A The telephone number is none. Age twenty-four. Occupation is welder. The statement was made at the robbery office, hour 1:20 p.m. The date is 1/11/77.

Q Please go on.

A Do you want me to read the whole statement?

MR. WEATHERBY: Well, actually at this point I think that would be necessary

unless Mr. Busch -- I mean Mr. Reese -- the question before the Court right now is the voluntariness of the statement and I would ask that the Court mark this for identification.

THE COURT: It will be so marked as State's Exhibit B for identification only.

(Whereupon, the foregoing document was marked as State's Exhibit B for identification purposes only.)

BY MR. WEATHERBY:

Q Detective Terry, might I inquire as to how you came to be called to go to Mr. Busch's residence on the morning of the 11th of January?

A Yes, sir. I went to assist Detective Kearney.

Q This statement pertains to a robbery at the Heart of Jacksonville --

A Yes.

Q -- on June -- well, the statement says June of 1976. Do you have any personal knowledge or did you have any knowledge of that crime?

A Yes, I did.

Q And what was that?

A There was a robbery in June of '76 at the

Heart of Jacksonville where a police officer who was working off duty as a security guard was present at the time the robbery was committed and his gun was taken from him.

Q Who was the detective assigned to that case?

A I was.

Q All right, sir. That then is one reason why you were called to participate in interviewing Mr. Busch?

A Yes.

MR. WEATHERBY: I have no further questions at this time, Your Honor.

THE COURT: Do you wish to inquire as to the voluntariness of this statement?

CROSS EXAMINATION

BY MR. REESE:

Q Mr. Terry, do you know what time of day you got to Mr. Busch's house?

A I would say it's sometime later than the morning, Mr. Reese, sometime around between 10:00 and 11:00 o'clock, somewhere around there, mid-morning hour.

Q And do you know when you all had learned of Mr. Busch's alleged involvement in this robbery?

A I was advised by Mr. Kearney either a day or so before. I don't know when. He had obtained the information on it that --

Q Do you know whether anybody had ever applied for a warrant for his arrest?

A No, sir, I don't.

Q Was one acquired?

A At the time he was arrested, I don't believe there was one outstanding.

Q Has one been acquired since?

A I don't know, Mr. Reese.

Q To your knowledge, has a warrant ever been requested?

A To my knowledge, it hasn't. Like I say, I don't know.

Q Were you ever told that Mr. Winters had identified Mr. Busch as a participant on January the -- Januray the 3rd or sometime in there?

A The only thing I was told, Mr. Reese, is there had been a conversation with Mr. Winters, but I wasn't advised what the conversation was.

Q You were not advised Mr. Busch had been identified at that time?

A No, sir.

Q Okay. When you went to the house and went

inside, did you and Mr. Kearney both have your guns out?

A I know Mr. Kearney had his out. I believe I had mine out. I'm not sure right now.

Q And did you point them at him when you woke him up?

A Yes, sir.

Q And where did you point it at him? Head? Foot?

A No particular -- I mean it wasn't pointed at his foot.

Q I wouldn't think so, but --

A No.

Q At his body?

A At his body, yes.

Q And how far from his body would you say the gun was when you --

A We were standing approximately two to three feet from him.

Q And your gun would have been closer yet, is that true?

A Not necessarily, no, sir.

Q Well, was it, in fact, closer to him?

A I'd say the gun was about three feet from him.

Q And was Mr. Kearney in the same location and the same distance?

A Yes, sir.

Q On opposite sides of the bed or together or --

A We were standing side by side.

Q In any event, Mr. Busch offered no resistance, is that correct?

A That's correct.

Q And when he was handcuffed and taken down, do you know where in the process his handcuffs were taken off?

A I believe they were taken off in the interview room of the robbery office.

Q At what time?

A Shortly after we got there.

Q Are you quite sure that the uniformed officers didn't transport Mr. Busch there?

A I said before I'm not sure they did not, to the best of my knowledge. It's been some time ago. To the best of my knowledge, Kearney and I probably transported him.

Q And in the interview room itself, did you and Officer Kearney and Officer Bradley have your weapons with you?

A Yes, sir.

Q And were they visible?

A They could have been, I imagine.

Q All right. Excuse me for interrupting you. Where were you wearing them? Where were they on your body?

A In a holster.

Q And where was the holster?

A On the side. Mine was.

Q And was your coat on or off?

A I assume the coat was off. I'm not real sure whether it was or not.

Q And would the same be true of Mr. Kearney?

A Yes.

Q If you recall, how about Mr. Bradley?

A I believe the same would be true of him also.

Q Did anybody else ever come in the room other than uniformed officers? I mean -- not uniformed -- officers and Mr. Busch?

A No, sir.

Q Did anybody appear to take a written statement?

A I took a written statement.

Q Was it taken electronically?

A No, sir.

Q Any video tape made of it or anything like that?

A No, sir.

Q No recording? And where in the process did Mr. Bradley leave?

A I think Mr. Bradley left shortly after he was advised of his rights.

Q Can I ask you why nobody asked for a warrant?

A I don't know, Mr. Reese. It's like I stated before, I had just received this information possibly a day or so before and due to the lack of leads that I had at the time working the robbery, I had suspended the case and at this time due to the information that had been received by Detective Kearney and Bradley, they reopened the case and I don't know why they did not request a warrant. I don't know that they didn't.

Q Did anybody make inquiry as to whether Mr. Busch -- what his mental condition was, whether he was sick, anything like that?

A From the appearances of Mr. Busch and the way he reacted and talked, he didn't appear to have any mental condition.

Q Would you answer my question? Do you know?

A No, sir.

Q What led you to believe that you had probable cause to arrest Mr. Busch?

A On the information that Detective Kearney and Bradley had obtained and it was relayed to me and --

Q And what was that?

A They said they had obtained information from a reliable source he had been involved in the robbery at the Heart of Jacksonville Motel and asked if I would assist them in going to arrest him, which I did.

Q Did they identify the reliable source?

A No, sir, not at the time.

Q And you don't know right now who it was, the reliable source was?

A I know now who it is. I didn't at the time.

Q Johnny Winters?

A Yes, sir.

Q Did he strike you as being a reliable source?

A I don't know. I've never had any dealings with Johnny Winters.

Q Are you familiar with his record?

A No, sir, not that much.

Q Do you know that he's been convicted of

several felonies, admitted to some sixty-odd robberies?

A I know that now. I didn't know it at the time.

Q Had you known at the time -- had you known it, would you have thought he was a reliable witness?

A I wouldn't say. I wouldn't know. I don't know the dealings. I don't know how well Mr. Kearney knew Mr. Winters or Mr. Bradley. I don't know whether they had any dealings with him before or not. I couldn't establish his reliability without having talked to the man myself.

Q My question is: Do you think he's a reliable witness with what you have learned of him since?

A I don't really know, Mr. Reese. I couldn't answer that yes or no.

Q You have learned since that he's killed somebody?

A Yes, sir.

Q He's threatened to kill a police officer?

A I didn't know he had threatened to kill a police officer.

Q At the Heart of Jacksonville, didn't Officer Bramlett say he said, "Don't move or I'll

kill you"?

A Yes, he said that.

Q And he has admitted some fifty or sixty robberies?

A I would -- like I say, I don't think I could answer it yes or no. The only thing I could say is if he had knowledge of the crime and could put this man in the crime, then I would say he would be reliable.

Q Would it be true to say that Mr. Busch talked to you all for some period of time and you synthecized what has been said or what your understanding of the nature of the conversation was and that some things that he said were left out?

A Like I say, the statement was not a verbatim statement, Mr. Reese. I explained that to Mr. Busch before I read the statement and I'm sure that some minor things he said were probably left out because it was not written word for word.

Q I understand that.

A Yes, sir.

Q In other words, you -- I'm not questioning you right now, but what you have here is what he said?

A Yes, sir.

Q I'm asking you if he said things that were

not in here.

A Probably, yes, sir.

MR. REESE: Your Honor, I have no further questions.

REDIRECT EXAMINATION

BY MR. WEATHERBY:

Q Mr. Terry, is there anything in the statement that he did not tell you?

A Pertaining to the robbery?

Q Right.

A No, sir.

Q Are you aware that or did you become aware or were you aware at the time of the arrest that the source that Detective Kearney was talking about who you have found out later was Johnny Winters was the person involved in the Heart of Jacksonville robbery?

A I knew it after he was arrested and I talked to him.

Q But you went along to assist Officer Kearney in the arrest?

A Yes, sir.

Q And it was your understanding that it was Officer Kearney's -- that he had the probable cause

to make the arrest, is that correct?

A Yes.

Q All right. Now, subsequent to that you have found, I believe, that it was Johnny Winters who made the statement to Detective Kearney?

A Yes, sir.

Q That Johnny Winters, in fact, confessed his participation in the Heart of Jacksonville robbery, is that correct?

A Yes.

Q And, in fact, during that statement he implicated Mr. Busch?

A Yes, sir.

Q And it has subsequently become -- has come to your attention that that is the reason that Detective Kearney went out looking for Mr. Busch; is that correct?

A Yes, sir.

MR. WEATHERBY: All right, I have no further questions, Your Honor.

Your Honor, I would offer the statement as having been voluntarily given.

THE COURT: All right, Mr. Reese.

MR. REESE: Your Honor, I would object to the statement.

THE COURT: Certainly.

MR. REESE: First, there has been no showing of a chain of possession. Secondly, there is no probable cause to arrest because -- well, then, third, that they had a chance to get a -- to go before a Court and get a warrant which they did not do; that Mr. Busch was arrested at close gunpoint, taken in handcuffs to a station and in a room with three officers who had guns and was not forcibly coerced, but was scared and that there is no showing it is voluntary and, under the circumstances, it could not have been voluntary.

THE COURT: And I assume that you do not wish to present any evidence yourself on this matter?

MR. REESE: I would like Mr. Busch to testify on this. He's not going to testify at the trial.

THE COURT: Well, I think he certainly can on the nature of voluntariness.

Can we excuse Detective Terry?

MR. WEATHERBY: Are we at the point of arguing or is Mr. Busch going to testify?

THE COURT: Well, I think if there is further evidence to come before the Court we need that.

MR. WEATHERBY: Your Honor, I would reserve the right to recall Detective Terry after Mr. Busch testifies.

THE COURT: You may step outside.

(Witness excused.)

MR. WEATHERBY: Your Honor, may we have just a moment?

THE COURT: Yes, sir.

(Mr. Weatherby conferring with Mr. Reese.)

MR. WEATHERBY: Your Honor, we'd be ready to hear from Mr. Busch at this point.

THE COURT: All right, Mr. Busch, do you want to come forward and be sworn in, please?

(Defendant sworn by Clerk.)

THE COURT: You can have a seat in the witness stand.

VINCENT ANTHONY BUSCH,

was called as a witness in his own behalf, and after having been first duly sworn, then testified as

follows:

DIRECT EXAMINATION

BY MR. REESE:

Q Could you give me your name, please, sir?

A Vincent Anthony Busch.

THE COURT: Mr. Busch, you are going to have to speak out a little louder.

BY MR. REESE:

Q And how old are you, Mr. Busch?

A Twenty-four.

Q And where do you live?

A 434 East Sixth Street.

Q And were you living there on January 11th, 1977?

A Yes, sir.

Q Do you remember officers coming to the house?

A Yes, I do.

Q Tell us what was the first thing you remember.

A Well, I was half asleep and somebody knocked on the door and my sister answered the door. They just knocked on the door and came on in. Then I asked them -- my brother was standing on the staircase and I saw him keep pointing like this

here (indicating). I didn't know if they had a gun pointed at him or not, which I found out later they had mistaken him for me.

Q Okay. And what did the officers do?

A They came around into the living room and pointed a gun at me. I just looked at them and told them I got to be dreaming and covered back up.

Q And how many officers were there?

A Three.

Q And were they pointing guns at you?

A Yes, sir.

Q And how close were they?

A About from here -- from where I am to where she is now (indicating).

Q And where were the weapons pointed?

A In the vicinity mostly of my head and chest.

Q Did you offer any resistance?

A Uh-uh (negative).

Q All right. What happened next?

A Well, he told me to come from under -- bring my arms from under the covers slowly and don't try no false movements or anything. So, I did what they asked and after I did this, then he kind of removed the pillows off the sofa and went to

searching and I asked him what he was searching for. He told me he was searching for an officer's gun that was taken in a robbery.

Q Did anybody ever show you a warrant for either a search or arrest?

A No. I asked him what I was being -- what was the nature of this arrest. He said for murder.

Q For murder?

A (Nodding head affirmatively.)

Q Who said that? Do you remember?

A One of the officers said it.

Q Okay. What happened then?

A So, they got up -- well, got up and started -- well, I went to put on my clothes and shoes and before I could do that they just handcuffed me. My sister threw a jacket over me and they took me down the street to a police car, put me in and they transported me from where I lived at to the Courthouse down here.

Q And who transported you?

A Uniformed officers.

Q Was Mr. Terry who just testified -- did he transport you down here?

A No.

Q All right. What happened next?

A I went up to the robbery office and they were sitting down talking. They say, "Well, we know all about the robberies you were in with Winters." I said, "How you know? I don't know about that myself." He said, "Well, we talked to Winters and we made a tape." And I asked him could I listen to some of it, so they started playing the first part saying, well, there was something about I was supposed to have been mixed up in the murder, when the bellhop came out of the elevator or something I was standing by the elevator and shot him. Then they stopped the tape.

Q All right. What happened then?

A Then they went outside and talked for a few minutes. One of them came back and started reading my rights and I signed that and one of them left out again and one would leave out and one would come in.

Q Would the officers -- did the officers have their guns on? Were they visible to you?

A Yes. They was hanging up under their shoulder. One of the officers got in a conversation about weapons and I told him I didn't know the difference between a .38 or a .357.

Q All right. And did you tell the officers

the things that were in this statement?

A Yes, I did.

Q And did you tell them other things?

A I told them some of the things that was in the statement.

Q What did you tell them that's not in here?

A Well, he asked me about -- he say, "Do you know anything about the Heart of Jacksonville?" I say, "Yes, I do." He asked me what. I say, "Well, on that particular day me and Johnny Winters was sitting where -- Johnny Winters was across the street to a friend of his house and he saw me and came over. We were sitting on the porch talking. Johnny Winters told me, say, 'I have got to go deliver a package. If you want to come along you can make forty or fifty dollars.' " I told him, "Okay." So, we went to the hotel. He say, "I got to go up here and check with this man. I'll be right back." I went upstairs walking around and he say, "Well, the man must not be in." He walked around the desk. Okay. I went around the other side of it. I walked around the side of the desk and when I came back Johnny Winters already had a gun on the people and everything.

Q All right.

A So, at this point he said -- he told me to

come back and tie everybody up and I hesitated for a few minutes and he told me again so I just went on and did what he asked.

Q Why did you do that?

A Well, one reason, if I had ran I don't know what would have happened. If I had left there at that time, there is no telling what might have happened.

Q Did you tell them all this at the office?

A Yes.

Q Did you tell them that you did not participate willingly?

A Yes, I did.

Q When did they tell you what you had been arrested for?

A After they got me down to the office they say, "Well, you was" -- they didn't -- they just kept telling me I was arrested for murder and after I got over here to the jailhouse, then they booked me. Then I saw I was arrested for robbery and murder.

MR. REESE: I have nothing further.

THE COURT: Mr. Weatherby.

CROSS EXAMINATION

BY MR. WEATHERBY:

Q Mr. Busch, I would remind you that you are under oath to tell the truth.

Did either of the detectives that were in the office with you ever threaten you with those weapons?

A Not that I know of.

Q Did they ever strike you with the weapons?

A No.

Q Did they ever hit you with their hands?

A No.

Q As a matter of fact, they were pretty gentlemanly about the whole thing, weren't they?

A Yeah.

Q And it's your testimony here this morning that you never told the officers what is in that statement?

A I said I didn't ever tell them. I told them some of the things that was in there, but some of the things that I told them they did not put in there.

Q I'm sorry. I misunderstood. But you at least acknowledge that some of the stuff that is in the statement is true?

A Right.

MR. WEATHERBY: I have no other

questions, Your Honor.

MR. REESE: I have nothing further.

THE COURT: Mr. Busch, do you recall about how long you were up in the office?

THE WITNESS: Let me see. They picked me up that morning sometime between 9:30 and 10:00 and I didn't get over to the jailhouse until that evening sometime, a little after 2:00 or 1:30, somewhere in there. I can't be certain for sure, because there wasn't no clock around.

THE COURT: All right. I don't have any further questions.

MR. WEATHERBY: Your Honor, I have no other questions.

THE COURT: You may step down, Mr. Busch. Resume your seat out there.

MR. WEATHERBY: Your Honor, to save the Court some time and perhaps answer some questions the Court might have, I'd like to state certain facts and I think possibly Mr. Reese might be willing to stipulate to them. As to your last question, the time involved, what Officer Terry did not testify to was that other

statements were taken from Mr. Busch. I had not mentioned this since we're on a proffer.

THE COURT: I realized after I asked that question I was probably getting into that area.

MR. WEATHERBY: That I think explains the time period. I do not intend to ask Officer Terry of any other statements during the presentation of evidence. The other thing is that I believe that Mr. --

(Mr. Weatherby conferring with Mr. Reese.)

MR. WEATHERBY: All right, Your Honor, the stipulation is Mr. Busch was, in fact, arrested for murder and I believe that we would both stipulate that that charge was -- he was, in fact, booked for that charge. That was based on information that Winters had given them that also pertained to another case, the Ambassador robbery, and the policy being to simply book for the highest charge.

MR. REESE: That's correct. If we might have just a minute.

(Mr. Reese conferring with Mr. Weatherby.)

MR. WEATHERBY: The murder charge is not pending, was never filed against Mr. Busch, Your Honor.

THE COURT: All right.

MR. WEATHERBY: Did we have a stipulation?

MR. REESE: Yes, that is agreeable.

THE COURT: All right, fine. Thank you.

All right, any further evidence as to the motion to suppress?

MR. REESE: No, ma'am.

MR. WEATHERBY: I think not, Your Honor.

THE COURT: Then I'd be happy to hear from Counsel as to any argument. I know that you have made a portion of your argument which I remember.

MR. REESE: I would just renew that and again say that he was alone in a room and he said some things and some things are not in there. I would stand on the other things that I have said.

THE COURT: All right, thank you,

Mr. Reese.

Mr. Weatherby.

MR. WEATHERBY: Your Honor, that, of course, is the defendant's position, but I don't think that goes to the voluntariness of the confession. Mr. Busch himself acknowledged on the stand that the officers were quite gentlemanly and he was never threatened into giving a statement which is consistent with what Officer Kearney said -- excuse me -- Detective Terry said. Speaking to the motion to suppress, Your Honor, I would suggest to the Court the Florida Statutes that provide that an arrest warrant is not necessary where a police officer has probable grounds or probable cause to believe that a person is committing or about to commit a felony somewhere in the state and the statement from Detective Kearney -- from Detective Terry pertaining to the information which was available to Detective Kearney at that time was certainly sufficient probable cause to believe that Mr. Busch had involvement in it; therefore, there was sufficient

grounds for arrest, notwithstanding the lack of the issuance of an arrest warrant.

THE COURT: All right. Anything further before I rule as to the voluntariness of the statement?

MR. REESE: Your Honor, of course, I think we said earlier we would say that there was no probable cause.

THE COURT: Right. All right. considering all the evidence, including Mr. Busch's testimony, the Court would find that the statement was freely and voluntarily made and that would be therefore admissible.

All right, Gentlemen, we have the Jury, I think, all present. Would you all like a few minutes before we call the Jury in or--

MR. WEATHERBY: I'd like just a moment with Mr. Carlisle, Your Honor, and I believe we could commence as soon as the Jury gets back. I feel we should take them back into the room first.

THE COURT: All right, let's recess then for ten minutes.

(Recess.)

(Jury absent.)

THE COURT: We need to recall the witness, Mr. Winters.

MR. WEATHERBY: Your Honor, Mr. Carlisle is in the process of acquiring him, I think. Here he is.

THE COURT: All right, Mr. Winters, if you will take your seat in the stand again.

All right, Mr. Weatherby, anything before we bring the Jury out?

MR. WEATHERBY: No, Your Honor. I request that we bring the Jury out.

(Jury present.)

THE COURT: All right, Mr. Weatherby, you may proceed.

MR. WEATHERBY: Your Honor, at the last juncture of the trial Mr. Winters had exercised his Fifth Amendment right to remain silent and I have no questions.

MR. REESE: We have no questions.

THE COURT: All right, Ladies and Gentlemen, the witness has exercised a constitutional right to remain silent and at this time, Mr. Winters, you are excused

MARIE SPLANE
OFFICIAL COURT REPORTER
JACKSONVILLE, FLORIDA 32202

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 77-239 CF A

DIVISION: S

STATE OF FLORIDA

—vs—

(A)TONY RICHARD MILLER
(B) VINCENT ANTHONY BUSCH
also known as, VINCENT ANTHONY BUSH

ORDER

This cause coming on before the Court upon the (Defendant's) (~~Xxxxx~~ MOTION TO SUPPRESS

filed herein on the 19th day of APRIL, 1977, and the Court having heard arguments of the State's attorney and of counsel for defense, and being fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED that the aforesaid MOTION shall be and the same is hereby denied as to defendant (B) Vincent Anthony Busch

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida, this 28th day of April, 1977

Circuit Judge

R-56

VOL 4414 PG 343
OFFICIAL RECORDS

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

Case Number 77-239 CF

Division S

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

vs

Vincent Anthony Busch (B)
Defendant

FILED
JUN 22 1977
S. Morgan Slaughter
CLERK - CIRCUIT COURT

JUDGMENT AND SENTENCE
(STATE PRISON)

You, Vincent Anthony Busch

being now before this Court, attended by your attorney, C. Reese

and you having been tried and found guilty of the crime of ~~entered a plea of guilty to the crime of~~ ~~entered a plea of Nolo Contendere~~ Robbery (Armed)

The Court adjudges you guilty of said offense. Do you have any cause to show why sentence of the law should not be pronounced upon you, or anything to offer in mitigation of sentence? Saying nothing sufficient, it is the sentence of the law and judgment of the Court that you be committed to the custody of the Division of Corrections of the State of Florida, to be imprisoned at hard labor for the term of 35 years, with Credit For 162 Days Jail Time.

in the institution in the State Correctional System to which said Division may cause you to be confined. The Sheriff of Duval County, Florida, is hereby ordered and directed to deliver you to said Division at Lake Butler, Florida, with a copy of this judgment and sentence. In addition thereto, you shall pay the sum of $1.00 for the use of the Florida Police Academy. The Court now advises you that it is your right to appeal from this judgment and sentence within 30 days from this date. You are further advised that you are entitled to assistance of counsel in taking an appeal. Upon your request, and showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida this 22 day of June, A.D., 19 77.

THIS INSTRUMENT IN COMPUTER

Dorothy H Otte
Judge

FINGERPRINTS

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	**7. L. Index**	**8. L. Middle**	**9. L. Ring**	**10. L. Little**

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the defendant, Vincent Anthony Busch, and that they were placed thereon by said defendant in my presence in Open Court this 22 day of June, 19 77.

Fingerprints taken by

V ARGUMENT

POINT I

THE TRIAL JUDGE SHOULD HAVE SUPPRESSED THE APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT (This point arises from assignment of error no. 5).

The facts of the appellant's arrest are virtually uncontradicted. The officers had talked with an alleged perpetrator of the crime who confessed his involvement and implicated the appellant. This information was learned by the officers at least one day prior to the appellant's arrest. No effort was made to obtain an arrest warrant. The officers went to the appellant's home where several people were present, they entered the home after identifying themselves, they found the appellant asleep on a sofa, and they woke him with guns drawn and placed him under arrest.

The appellant's counsel challenged the admissibility of the statement obtained two hours after the arrest by appropriate pre-trial motion and by argument at the hearing. The State offered no evidence that a warrant had been obtained and no justification for the failure to seek a warrant.

Appellant contends that the confession made by the appellant within two hours of his arrest was the direct result

of unconstitutional custody and the trial judge erred in failing to suppress the statement. The basis of the argument that the custody was unconstitutional is the contention that the warrantless arrest of the appellant in his home violated the appellant's right to be secure in his person and in his house against unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

By case decision under federal law, and by express provision in the Florida Constitution, an exclusionary rule is applied to evidence obtained in violation of the prohibition against unreasonable searches and seizures. Specifically as to statements or other evidence resulting from an unlawful seizure of the person the United States Supreme Court has held that evidence, including statements, which is tainted by an illegal arrest cannot be used by the State to prove guilt. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975); Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676 (1969).

Even the giving of the warnings required by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966) cannot automatically dissipate the taint of an illegal arrest because, as the Court noted in Brown, supra, 422 U.S. at 601-603, 45 L.Ed.2d at 426, 427:

> "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See Davis v. Mississippi, 394 U.S. 721, 726-727, 22 L.Ed. 2d 676, 89 S.Ct. 1394 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation', would be encouraged by the knowledge that evidence derived therefrom hopefully could be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all', and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words' See Mapp v. Ohio, 367 U.S., at 468, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 A.L.R. 2d 933." (Emphasis added) 422 U.S. at 601-603, 45 L.Ed.2d at 426,427.

This Court has held that when illegal custody is closely followed by the giving of an incriminating statement the Fourth Amendment violation renders the statement inadmissible. R.L.J. v. State, 336 So.2d 132 (Fla. 1 DCA 1976) certiorari pending, case no. 50,253 Florida Supreme Court.

The primary issue, however, is whether the warrantless arrest of the appellant in his home violated privacy interests protected by the prohibitions against unreasonable searches and seizures. This issue has never been squarely resolved

by the United States Supreme Court. The Florida Supreme Court has refused to anticipate the evenutal holding of the Federal Supreme Court on this point and has consequently held that a warrantless arrest of a suspect in his home is lawful pursuant to Section 901.15(3), Florida Statutes (1975). State v. Perez, 277 So.2d 778 (Fla. 1973) cert. den. 414 U.S. 1064.

It is appellant's contention that despite the contrary indications by the Florida Supreme Court in Perez, supra, the Fourth Amendment to the United States Constitution ultimately will be held to prohibit the warrantless arrest of a suspect in his home in the absence of a showing of exigent circumstances. Since this issue was properly raised in the court below it is preserved for appellate review by this Court.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, Section 12 of the Florida Constitution contains similar wording.

The provisions of both the federal and state constitutions

contain a reference to obtaining warrants which is commonly known as the Warrant Clause. The United States Supreme Court has construed the Fourth Amendment to mean that the Warrant Clause requires the obtaining of a search warrant prior to law enforcement agents searching premises even though probable cause unquestionably exists. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145 (1925); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Jones v. United States, 357 U.S. 493, 2 L.Ed.2d 1514 (1958). Exceptions to the requirement of a warrant for searching premises are limited to "only a few specifically established and well-delineated exceptions" Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967). The Florida Supreme Court has recently reiterated this principle in Hornblower v. State, (not yet reported) case no. 49,568 Florida Supreme Court opinion filed October 27, 1977.

The issue now before the Court, however, raises the question of whether a warrant should likewise be required, or an exigency demonstrated, when a person is arrested in his home. This issue was mentioned, but not decided, in Jones v. United States, supra, 357 U.S. 493, 499, 500, 2 L.Ed.2d 1514, 1519 when the Court responded to the government's argument that federal officers had the right to arrest a suspect upon probable cause in his home without a warrant and said:

"These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment. But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government." (Emphasis added).

This same issue was again addressed, but not decided, in a portion of the majority opinion in Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971). Justice Stewart noted in Coolidge that it had been argued in dissent that police have the right to arrest upon probable cause without a warrant and without demonstrating exigent circumstances and said:

"If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution. Indeed, if Mr. Justice White is correct that it has generally been assumed that the Fourth Amendment is not violated

by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption.

* * *

None of the cases cited by Mr. Justice White disposes of this 'grave constitutional question.' The case of Warden v Hayden, supra, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. See also Davis v Mississippi, 394 US 721, 728, 22 L Ed 2d 676, 681, 89 S Ct 1394; Wong Sun v United States, 371 US, at 481-482, 9 L Ed 2d, at 451." (Emphasis added) 403 U.S. at 480, 481, 29 L.Ed.2d at 591.

The Court again took up the issue of warrantless arrests in Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975) in stating:

"Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v Ohio, supra, at 96, 13 L Ed 2d 142; Wong Sun v United States, 371 US 471,

> 479-482, 9 L Ed 2d 441, 83 S Ct 407 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warant." 420 U.S. at 113, 43 L.Ed.2d at 64,65.

In a footnote to that passage, however, the Court distinguished the general question of warrantless arrests from the more specific issue present here of a warrantless arrest in the home and said:

> "The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Gerstein v. Pugh, supra, 420 U.S. at 113, 43 L.Ed.2d at 65 fn. 13.

In United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976) five members of the Court held that a warrantless arrest was permissible, without exception, when the arrest occurred in a public place. The limited scope of the holding in Watson is emphasized by this comment in the majority opinion:

> "6. In the case before us the Court of Appeals relied heavily, but mistakenly, on Coolidge v New Hampshire, 403 US 443, 480-481, 29 L Ed 2d 564, 91 S Ct 2022 (1971), for as we noted in Gerstein v Pugh, 420 US, at 113 n 13, 43 L Ed 2d 54, 95 S Ct 854, the still unsettled question posed in that part of the Coolidge opinion was 'whether and under what circumstances an officer

> may enter a suspect's home to make a warrantless arrest.' Watson's midday public arrest does not present that question." (Emphasis added) 423 U.S. at 418, 46 L.Ed.2d at 605

Although concurring in the majority opinion, Justice Powell took care to comment on what was not included in the decision, saying:

> "[W]e do not today consider or decide whether or under what circumstances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." 423 U.S. at 432, 433, 46 L.Ed.2d at 614.

Justice Stewart noted in a concurring opinion that since the arrest in Watson was made with probable cause "in a public place in broad daylight" the Court did not decide "whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest." 423 U.S. at 433, 46 L.Ed.2d at 614.

Justices Marshall and Brennan dissented and Justice Stevens did not participate.

The most recent pronouncement by the Court on this issue again left open the question whether a warrant is required to make an arrest of a suspect at home in the absence of exigent circumstances. United States v. Santana,

427 U.S. 38, 49 L.Ed.2d 300 (1976). Seven justices joined in the opinion holding that a warrant was not necessary under the facts presented. A narcotics officer had made a buy with marked money from a suspected seller and after the seller was arrested within a few blocks of the home of defendant Santana the officers returned to Santana's dwelling for the purpose of recovering the marked money. They saw Santana standing in the doorway of the house with a brown paper bag in her hand. As they pulled to within 15 feet of her and got out of their van shouting "Police" Santana retreated into the vestibule of her house. The officers followed through the open door, catching her in the vestibule. Police recovered two bundles of heroin that fell from the paper bag and $70 of marked money from Santana's pockets. On Santana's motion the District Court suppressed the evidence finding that a warrant should have been obtained either for Santana's arrest or for a search to recover the marked money. Nevertheless the District Court found that the police acted under extreme emergency conditions. The Court of Appeals affirmed the decision of the District Court but the United States Supreme Court reversed because the arrest had been "set in motion in a public place." 427 U.S. at 43, 49 L.Ed.2d at 306. Again the Court reserved the question of a warrantless arrest of a suspect in his home saying:

> "While it may be true that under the common law of property the threshold of one's dwelling is 'private', as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy. 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.' Katz v United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Hester v United States, 265 US 57, 59, 68 L Ed 898, 44 S Ct 445 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in Watson." (Emphasis added) 427 U.S. at 42, 49 L.Ed.2d at 305.

Again, however, there were concurring and dissenting opinions, emphasizing the still undecided status of warrantless arrests made in the home. Justice Stewart joined the concurring opinion of Justice Stevens, who pointed out that the arrest was justified because of either exigent circumstances or harmless error. A significant fact was the appearance of Ms. Santana in the doorway of her home, an area not considered within the ambit of reasonable expectation of privacy. United States v. Santana, supra, 427 U.S. at 44,

45, 49 L.Ed.2d at 306 (Stevens, J., concurring).

Justice Brennan joined Justice Marshall's dissent. reiterating the protest to the Court's earlier blanket acceptance of warrantless arrests in public places announced in Watson. United States v. Santana, supra, 427 U.S. at 45-49, 49 L.Ed.2d at 306-309 (Marshall, J., dissenting).

Therefore it appears that the presently constituted Supreme Court has not reached a majority decision on the right of police to make a warrantless arrest of a suspect in his home absent a showing of exigent circumstances. Of the five justices who concurred in the majority opinion in Watson, only Justice White has consistently maintained a position allowing all arrests to be warrantless. Chimel v. California, 395 U.S. 752, 770-783, 23 L.Ed.2d 685, 698-706 (1969) (White, J., dissenting); Coolidge v. New Hampshire, supra, 403 U.S. at 511-512, fn.1,29 L.Ed.2d at 609-610. (White, J., concurring and dissenting). Justices Marshall and Brennan, as noted in dissents registered in Watson and Santana, have consistently taken the contrary position. Justice Stewart has expressed serious doubts about the validity of warrantless arrests in the home, Coolidge v. New Hampshire, supra, 403 U.S. at 480-481, 29 L.Ed.2d at 591 and made clear that the issue was not before the Court

in either Watson or Santana. Justice Stevens maintained a position of announced neutrality on this point in Santana (and took no part in Watson). Justice Powell has likewise taken care to note specifically that the issue was not being decided by Watson. Justices Blackmun, Rehnquist, and the Chief Justice joined the majority opinions in both Watson and Santana, in which the question was reserved, and have not otherwise expressed an opinion.

It seems clear, therefore, that eventually the Court will have to decide if the Warrant Clause applies to arrests in the home. Appellant submits that the trend of decisions leads inexorably to the conclusion that it does, and that the Court will so hold. There are several reasons for this prediction.

First, the Court has taken great care to isolate this issue in its two recent decisions otherwise allowing warrantless arrests. Each time there have been justices concurring specifically to stress the reservation of the question, very likely indicating that had the majority not limited the scope of its holding to public places there might not have been a majority.

Second, just last term all members of the Court joined opinions chastizing the government for taking an extremely narrow view of the Warrant Clause in the context

of a post-arrest search of a footlocker. United States v. Chadwick, _____ U.S. _____, 53 L.Ed.2d 538 (1977); Blackmun. J., (joined by Rehnquish, J.) dissenting, 53 L.Ed.2d at 552; Brennan, J., concurring, Id. at 551.

Third, in slightly different contexts the Court has drawn a sharp distinction between interests which are more deserving of the protection of the Warrant Clause, depending on the degree of the individual's expectation of privacy. Compare, e.g. Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967) (warrant required to intercept private telephone conversations made from a telephone booth); United States v. United States District Court, 407 U.S. 297, 32 L.Ed.2d 752 (1972) (warrent required for electronic surveillance of conversations even though the purpose was "national security'); Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970) (warrant required for search of home); Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564 (warrant required to search car on private property); United States v. Chadwick, supra, _____ U.S. _____, 53 L.Ed.2d 538 (warrant required to search double locked footlocker seized at time of valid warrantless arrest); cf. Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542 (1969) (the state has no power to seize obscene material from the privacy of the home); with, e.g., Carroll v. United States, 267 U.S. 132, 69 L.Ed.2d 543 (1925)

(warrant not required to seize contraband from moving vehicle); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419 (1970) (warrant not required to search vehicle at police station after its seizure on the highway, a decision which did not obviate the necessity for a warrant to search the more privately held possession of a footlocker seized under similar circumstances in Chadwick); Cardwell v. Lewis, 417 U.S. 583, 41 L.Ed.2d 325 (1974) (warrant not required to search exterior of car parked on public property).

Based on this analysis and comparison of decisions, a persuasive argument can be made that as the expectation of privacy increases, there is a corresponding increase in the Court's willingness to apply the Warrant Clause by requiring advance judicial permission as an adjunct to probable cause.

Moreover, the explicit language of the Court in prior decisions evinces a strong tendency to protect persons in their homes and other private areas (as opposed to more public places) from direct police intrusion by the insulation of the Warrant Clause.

For example, in Agnello v. United States, 269 U.S. 20, 33, 70 L.Ed. 145 (1925) the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding

facts unquestionably showing probable cause.:

In Cooper v. California, 386 U.S. 58, 59, 17 L.Ed.2d 730, 731 (1967) the Court said:

> "[S]earches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property.:

In United States v. United States District Court, supra, 407 U.S. 297, 32 L.Ed.2d 752, the Court stressed the importance of the Warrant Clause in these terms;

> "Though the FourthAmendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause. Some have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' United States v Rabinowitz, 339 US 56, 66, 94 L Ed 653, 660, 70 S Ct 430 (1950).[16]

16. This view has not been accepted. In Chimel v. California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969), the Court considered the Government's contention that the search be judged on a general 'reasonableness' standard without reference to the warrant clause. The Court concluded that argument was 'founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point.' Id., at 764-765, 23 L Ed 2d at 694, 695.

> This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather, it has been 'a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.'" (Emphasis added) Id. at 765.

* * *

> "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. Katz v United States, supra, at 359-360, 19 L Ed 2d at 586, 587 (Douglas, J., concurring). But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[17]" (Emphasis added) Id. at 766.

17. H. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 79-105 (1937).

* * *

"It is true that there have been some exceptions to the warrant requirement. Chimel v California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969); Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968); McDonald v United States, 335 US 451, 93 L Ed 153, 69 S Ct 191 (1948); Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). But those exceptions are few in number and carefully delineated, Katz, supra, at 357, 19 L Ed 2d at 585; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' Terry v Ohio, supra, at 20, 20 L Ed 2d at 905; Chimel v. California, supra, at 762, 23 L Ed 2d at 693." (Emphasis added) Id. at 767.

In Cardwell v. Lewis, supra, 417 U.S. 583, 41 L.Ed.2d 325, the Court again noted the priority of privacy as a key to the warrant requirement, saying:

"Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Id., at 305-306, 65 L Ed 647. And it had been said earlier, 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.'" Id. at 334.

* * *

"At least since Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles." Id. at 334.

* * *

"There is still another distinguishing factor. 'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' Almeida-Sanchez v United States, 413 US 266, 279, 37 L Ed 2d 596, 93 S Ct 2535 (1973) (Powell, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Id. at 335. (Emphasis added).

In South Dakota v. Opperman, 428 U.S. 364, 367, 368, 49 L.Ed.2d 1000, 1004 (1976) the Court said:

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are 'effects' and thus within the reach of the Fourth Amendment, Cady v Dombrowski, 413 US 433, 439, 37 L Ed 2d 706, 93 S Ct 2523 (1973), warrantless examinations of automobiles have been upheld in circumstances in

> which a search of a home or office would not.
>
> * * *
>
> Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

Therefore, although the point has not been explicitly decided by the Court, appellant contends that he was protected by the Fourth Amendment from being arrested in his home by police who failed to obtain a warrant or explain why they did not. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." United States v. United States District Court, supra, 407 U.S. at 313, 32 L.Ed.2d at 764. The twin concepts stressed in Katz v. United States, supra, 389 U.S. 349, 19 L.Ed.2d 576, that the Amendment protects "people not places" and applies when there is a reasonable expectation of privacy, coalesce to shield appellant from the unilateral action taken by the police here. A more compelling example of abuse could hardly be imagined, when officers, acting only on hearsay from an accomplice, invade a private dwelling, awaken the sleeping appellant with drawn guns and spirit him away for questioning, without bothering first to seek the authority and neutral judgment

of a magistrate. This bypassing of the judiciary when making such a substantial assault on the privacy of a person in his home is intolerable, and surely will be found to violate the right to be free from unreasonable searches and seizures. This case is, on balance, only slightly different from those which have ruled that so-called "exigent circumstances" did not justify warrantless searches and seizures of property. Hornblower v. State, supra; Raffield v. State, (not reported) Fla. S.Ct. case 49,872, July 14, 1977; Parsons v. State, 334 So.2d 308 (Fla. 1 DCA 1976)(cert. discharged October 27, 1977); Shepard v. State, 310 So.2d 127 (Fla. 1 DCA 1975); Hannigan v. State, 307 So.2d 850 (Fla. 1 DCA 1975). There is no meaningful difference between raiding a home without a warrant when the purpose is arresting the occupant as distinguished from conducting a search. Both should require the advance judgment of a neutral magistrate. These words are appropriate, even though written in dissent.

> "We have recognized that 'the Fourth Amendment protects people, not places.' Katz v United States, supra, at 351, 19 L Ed 2d 576, 88 S Ct 507. Indeed, the privacy guaranteed by the Fourth Amendment is quintessentially personal. Cf. Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973); Doe v Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739 (1973); Griswold v Connecticut, 381 US 479, 14 L Ed

2d 510, 85 S Ct 1678 (1965). Thus a warrant is required in search situations not because of some high regard for property, but because of our regard for the individual, and his interest in his possessions and person.

> 'It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, - it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in the classic English warrant case of Entick v Carrington, 19 How St Tr 1029, 95 Eng Rep 807 (1765)].' Boyd v United States, 116 US 616, 630, 29 L Ed 746, 6 S Ct 524 (1886).

Not only is the Fourth Amendment directly addressed to the privacy of our citizens, but it speaks in indistinguishable terms about the freedom of both persons and property from unreasonable seizures. A warrant is required in the search situation to protect the privacy of the individual, but there can be no less invasion of privacy when the individual himself, rather than his property, is searched and seized. Indeed, an unjustified arrest that forces the individual temporarily to forfeit his right to control his person and movements and

> interrupts the course of his daily business may be more intrusive than an unjustified search.
>
> * * *
>
> A warrant requirement for arrests would, of course, minimize the possibility that such an intrusion into the individual's sacred sphere of personal privacy would occur on less than probable cause. Primarily for this reason, a warrant is required for searches. Surely there is no reason to place greater trust in the partisan assessment of a police officer that there is probable cause for an arrest than in his determination that probable cause exists for a search." 423 U.S. at 445-447, 46 L. Ed.2d at 622, 623 (Marshall, J., dissenting).

To underscore the need for a warrant here, it is significant that after the arrest the police first brought the appellant to the Sheriff's Office for questioning, rather than bringing him directly to a magistrate for the determination of probable cause and the advisement of rights. This action undercuts the assumption made in Chimel v. California, supra, 395 U.S. 752, 23 L.Ed.2d 685, by Justice White in arguing that warrants were unnecessary when he said that a warrantless arrest "demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into" and that the arrested person would be provided "almost immediately with a lawyer and a

judge". Id. at 782, 783, 23 L.Ed.2d at 705, 706.

Furthermore, the absence of prior judicial approval for the arrest here casts serious doubt on whether the police really had probable cause. The only evidence against appellant at trial was his own confession. The supposed "informer" took the Fifth Amendment at trial.

Under these circumstances it is virtually impossible to assess after the fact the actual information, and the indicia of its reliability, known by the police prior to appellant's arrest and confession. The floundering testimony of Officer Terry in explaining the facts known by he and other officers highlights the need for judicial determination of probable cause before, and not after, the arrest. In Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed.2d 142, 147 (1964) the Court commented on this same point, saying:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

Because the police in the case now before the Court failed to obtain prior judicial approval before arresting appellant in his home, when there was no showing of an excuse

for not obtaining an arrest warrant, the arrest was invalid under either the Federal and Florida Constitutions, or under both. The appellant's confession was the direct result of this unconstitutional arrest and should have been suppressed.

Supreme Court, U. S.
FILED
DEC 2 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RECORD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Detective Terry is here. Your Honor, Detective Terry has not been sworn, but I have advised him that the rule of secrecy has been invoked.

THE COURT: Fine.

I know that you are familiar with that rule, right?

MR. TERRY: Yes, ma'am.

THE COURT: Would you raise your right hand and be sworn by the Clerk?

(Witness sworn by Clerk.)

THE COURT: You may proceed.

MR. WEATHERBY: Thank you, Your Honor.

J. W. TERRY, JR.,

was called as a witness on behalf of the State, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. WEATHERBY:

Q Would you state your name and place of employment?

A J. W. Terry, Jr., employed by the Office of the Sheriff, Duval County.

Q And how long have you been so employed, sir?

A Approximately seven and a half years.

Q What is your present duty assignment, sir?

A Investigator in detective division.

Q Consistent with those duties, did you have occasion -- well, let me ask you this: Were you so employed in that division on or about the 11th of January, 1977, sir?

A Yes, sir, I was.

Q In what particular division were you assigned at that time?

A I was assigned to robbery detail.

Q On that date, Detective Terry, did you have occasion to come in contact with a one Vincent Anthony Busch?

A Yes, I did.

Q Do you see that person in the Courtroom today?

A Yes, sir.

Q Where is that person, sir? Would you describe what he's wearing?

A Sitting right at the table out there (indicating). He has on a white shirt.

MR. WEATHERBY: Could the record

reflect he has identified the defendant, Your Honor?

THE COURT: The record will so reflect.

BY MR. WEATHERBY:

Q What were the circumstances you first came into contact with Mr. Busch on that day, Detective Terry?

A I assisted Detective Kearney of robbery detail and Bradley of the homicide detail going to pick Mr. Busch up in the morning. I think it was in the late morning hours, 10:30, 11:00 o'clock, somewhere around there.

Q All right, sir. And where were you looking for Mr. Busch?

A I was advised by Detective Kearney that they had information that the defendant was involved in a robbery of the Heart of Jacksonville Motel.

Q And did you come in contact with Mr. Busch at that time?

A Yes, sir, I did.

Q Where was that, sir?

A He was at a residence. I don't recall the exact address without referring to a form that I had obtained from Mr. Busch later, but he was asleep on the couch in the living room and we arrested Mr. Busch

at this time. He was transported to the robbery office.

Q Would you describe the circumstances of the arrest, Detective Terry? What happened?

A What do you mean?

Q Well, what happened? You went to the house, you knocked on the door. What happened next?

A We went to the house. We identified ourselves. We were admitted to the house, went in -- I assume it was the living room.

Q Who answered the door?

A I don't recall who it was, sir. There was a number of people there in the house.

Q All right, sir. How did you identify yourselves?

A By showing our badges, told them that we were police officers from the Sheriff's Office.

Q Were you in uniform or in civilian clothing?

A We were in civilian clothes.

Q Did you have a uniformed officer with you?

A Yes, sir, we did. I'm not sure whether he was at the front door or not, but we went into the house and Mr. Busch was, like I say, asleep on the couch. We woke him up, advised him who we were, identified ourselves to him in the same manner,

advised him he was under arrest.

Q Did you at any time have occasion to use your weapons while at that residence?

A I believe the weapons were drawn.

Q Why was that?

A Well, due to the nature of the arrest. It was a serious felony.

Q Did you have occasion to return your weapons to the holsters?

A Yes, sir.

Q Approximately at what point?

A After we saw there would be no resistance to the arrest and which there wasn't. At this time Mr. Busch was taken to the -- or brought down to the Courthouse to the robbery office.

Q Did you place him in handcuffs?

A Yes, sir.

Q And how was he transported to the robbery office?

A I believe Detective Kearney and I transported him in our vehicle.

Q And at some point that morning -- do you remember approximately what time you arrived at the robbery office?

A It was shortly after 11:00 o'clock, sir.

Q And where is the robbery office, Detective Terry?

A It's on the fifth floor of the Courthouse.

Q Will you describe that office, sir?

A Yes, sir. You enter the main room and there are two other rooms. One is a room occupied by the supervisors, lieutenant and the sergeant, and the other is an interview room.

Q Approximately how large a room is it?

A The interview room?

Q Yes.

A I'd say approximately twelve by fifteen.

Q I'm sorry?

A Twelve by fifteen, approximately.

Q What is the nature of the light in that room, Detective Terry?

A It's average room lighting. The lights are in the ceiling. You have windows in the room.

Q Fluorescent or incandescent like we have in the Courtroom?

A Yes, sir.

Q All right. When you arrived in the Courthouse, did you go immediately to the robbery office with Mr. Busch?

A Yes, sir.

Q Did you make any stops on the way?

A No, sir.

Q When you got to that office -- well, let me ask you this: Did you accompany Mr. Busch?

A Detective Kearney and I both. I also believe Detective Bradley was present.

Q All right, sir. And you went to that office. During the trip from the residence where you apprehended Mr. Busch till the time you got to the Courthouse, were you in Mr. Busch's presence?

A Yes, sir.

Q I mean, did you ride in with him?

A Yes, sir, to the best of my knowledge, I believe that Detective Kearney and I transported him in our vehicle so we were with him all the time.

Q All right, sir. And the three of you then went up or came up to the robbery office after you got to the Courthouse, is that right?

A Yes, sir.

Q All right. What first transpired when you arrived at the interview room?

A Mr. Busch was advised of his constitutional rights, Miranda warnings, a standard rights form, and he admitted or he stated that he understood his rights, and the rights form was witnessed by myself,

Detective Kearney and Detective Bradley.

Q All right, sir. Was Mr. Busch still in handcuffs at this time?

A To the best of my knowledge, the handcuffs were removed once he was in the interview room.

Q All right. Detective Terry, you said you advised him of his rights using a particular form and that that was signed. What did you do with that form after Mr. Busch signed it?

A The form was placed in a case file that Detective Kearney had filed concerning the case.

Q All right, sir. Pursuant to instructions from me, did you have occasion to bring that form with you today?

A Yes, sir, I did.

Q Would you please produce it?

(Witness producing document.)

Q All right. This is the form that you utilized on the 11th of January?

A Yes, sir.

Q And what you just told the Court about?

A Yes, sir.

Q How do you know that this is the same form, sir?

A I recogniz e the form by my signature at the

bottom, Detective Kearney's signature in the middle, and Detective Bradley's signature as witnesses to the form.

Q All right. Will you please describe to the Court how the rights were administered or how Mr. Busch was advised of his rights, consistent with the use of this form?

A The rights were read from the form verbatim pursuant to the Miranda decisions and after each right was read to Mr. Busch, he was asked if he understood it.

Q All right. And did he indicate -- what was his response?

A He indicated he understood his rights.

Q All right. Would you please read for the record the statement there that you have?

A It's, "Your constitutional rights." It's, "place advised, robbery office." The date is the 11th, January, 1976. Time 11:40 a.m.

"You have the following rights under the United States Constitution. You don't have to make a statement or say anything. Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before you make a statement or before any

questions are asked of you and to have the lawyer with you during any questioning. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You may also stop the questioning at any time and consult with your appointed or privately employed lawyer."

The bottom of the rights form is, "Waiver of rights." It says, "I have read the above statement of my rights and understand the statement and understand what my rights are and I'm willing to make a statement and answer questions. I do not want to talk to a lawyer at this time. I have not been promised anything in exchange for a statement. I have not been threatened and there has been no pressure to get me to make a statement or answer questions." It's signed Vincent Anthony Busch. It's witnessed by Detective J. A. Bradley, Detective P. H. Kearney and Detective J. W. Terry.

Q And did you inquire if he understood those rights?

A Yes, sir.

Q And his response?

A That he did understand his rights.

Q Did he ever indicate to you that he wanted to talk to a lawyer?

A No, sir.

MR. WEATHERBY: Your Honor, the State would offer this into evidence as the State's Exhibit A.

THE COURT: A for identification?

MR. WEATHERBY: Yes, ma'am, if you would, A for identification.

THE COURT: All right, Mr. Reese, you are now looking at that exhibit?

MR. REESE: Yes, ma'am. Could I have just a moment?

THE COURT: Certainly.

(Mr. Reese examining document.)

MR. REESE: Your Honor, could I ask some questions of the witness? I would object to the introduction.

THE COURT: All right. This is marking only for identification at this time.

MR. REESE: I'm sorry.

THE COURT: This is a proffer at this stage of the trial. I believe Mr. Weatherby probably has a few more questions that he'd

like to ask.

MR. WEATHERBY: Yes.

BY MR. WEATHERBY:

Q Is that the form that Mr. Busch signed? Did he sign that form in your presence?

A Yes, sir.

Q All right. After you advised Mr. Busch of his constitutional rights by using that form, did you talk to him?

A Yes, sir.

Q Did he make any statements to you?

A Yes, sir. A short time later Mr. Busch gave a statement concerning the robbery which I wrote. It was not verbatim which was explained to Mr. Busch, that it would not be verbatim or word-for-word. After the statement was made, he looked at the statement and agreed basically with what was in the statement.

Q You read the statement to him?

A Yes, sir.

Q And you say he basically agreed with the facts in the statement?

A Yes.

Q All right. Where did you get those facts from, Detective Terry?

A Mr. Busch.

Q You had an oral conversation with him then relating to the robbery?

A Yes, sir.

Q And would you say that you substantially recorded in this statement the facts that he had given you, obviously not verbatim?

A Yes, sir.

Q It pretty well included everything that he had told you in the statement?

A Yes, sir.

Q Detective Terry, was anyone else present while Mr. Busch was giving this statement?

A Yes, sir, Detective Kearney was present.

Q Just the two of you then?

A Yes, sir.

Q During the time -- do I conclude that you were still in the robbery office?

A Yes, sir, in the interview room.

Q In the interview room?

A Yes, sir.

Q During the time that you and Detective Kearney were with Mr. Busch in the interview room, did you ever have occasion to draw your weapon?

A No, sir.

Q Did you ever observe Officer Kearney do that?

A No, sir.

Q During that time, did you ever have occasion to threaten Mr. Busch?

A No, sir.

Q Did you or did Detective Kearney while you were present?

A No, sir.

Q Either physically or verbally?

A No, sir.

Q Did you offer him any form of physical abuse?

A No, sir.

Q Did you offer him any hope of reward if he gave his statement?

A No, sir. We are not authorized to do that.

Q Did you promise him that you would recommend any light sentence to the State Attorney's Office or the Court if he gave a statement?

A No, sir. I think what was told to Mr. Busch is that we would tell the State Attorney or his attorney that he had cooperated, but we could not promise him anything.

Q Did you make any other kind of statements

like that to Mr. Busch?

A No, sir.

Q During the interview in this room, Detective Terry, did anyone else ever come in?

A To the best of my knowledge, they didn't.

Q Did Mr. Busch ever indicate an unwillingness to give you the statement once the interview had started?

A No, sir.

Q After you had -- let me ask you this: Why did you write the statement rather than him?

A It's just standard procedure. That's the only reason I did it.

Q But you did read the statement to him?

A Yes, sir.

Q After you read it, did you give him a chance to look at it?

A Yes, sir.

Q And did he make any comments?

A Except that it was basically what he said.

Q Did you give him an opportunity to sign it?

A Yes, sir.

Q And did anyone else sign that form?

A Did anyone else sign the form?

Q Yes.

A I witnessed the form and Detective Kearney also witnessed it.

Q He signed it in your presence then?

A Yes, sir.

Q What, if anything, happened to that statement after that date, sir?

A It was also put in the same case file as I mentioned before with the rights form.

Q All right. Did you have occasion to bring that today?

A Yes, sir, I did.

Q Pursuant to my instructions?

A Yes, sir.

Q Would you take it out, please?

(Witness producing document.)

Q You have a document here which appears to be handwritten on both sides. It's a one-page sheet. I ask you is there anything out of the ordinary that you recognize about this particular document that comes to your memory or how do you recognize it?

A Well, I recognize it by my handwriting and also by the fact that my signature is on the bottom of it as a witness and also that of Detective Kearney.

Q All right. And this is the same document that you took from Mr. Busch that day?

A Yes, sir.

Q All right. Would you please read the information that's at the top there in the text of that statement?

THE COURT: Mr. Reese, I assume you have received a copy of this statement?

MR. REESE: Yes.

MR. WEATHERBY: Oh, yes.

THE WITNESS: This is a standard statement form and the top of the statement is, "Name, Vincent Anthony Busch." Address is 834 East 6th Street.

BY MR. WEATHERBY:

Q Detective Terry, is that the address that you arrested Mr. Busch at?

A Yes, sir.

Q Please go on. I'm sorry.

A The telephone number is none. Age twenty-four. Occupation is welder. The statement was made at the robbery office, hour 1:20 p.m. The date is 1/11/77.

Q Please go on.

A Do you want me to read the whole statement?

MR. WEATHERBY: Well, actually at this point I think that would be necessary

unless Mr. Busch -- I mean Mr. Reese -- the question before the Court right now is the voluntariness of the statement and I would ask that the Court mark this for identification.

THE COURT: It will be so marked as State's Exhibit B for identification only.

(Whereupon, the foregoing document was marked as State's Exhibit B for identification purposes only.)

BY MR. WEATHERBY:

Q Detective Terry, might I inquire as to how you came to be called to go to Mr. Busch's residence on the morning of the 11th of January?

A Yes, sir. I went to assist Detective Kearney.

Q This statement pertains to a robbery at the Heart of Jacksonville --

A Yes.

Q -- on June -- well, the statement says June of 1976. Do you have any personal knowledge or did you have any knowledge of that crime?

A Yes, I did.

Q And what was that?

A There was a robbery in June of '76 at the

Heart of Jacksonville where a police officer who was working off duty as a security guard was present at the time the robbery was committed and his gun was taken from him.

Q Who was the detective assigned to that case?

A I was.

Q All right, sir. That then is one reason why you were called to participate in interviewing Mr. Busch?

A Yes.

MR. WEATHERBY: I have no further questions at this time, Your Honor.

THE COURT: Do you wish to inquire as to the voluntariness of this statement?

CROSS EXAMINATION

BY MR. REESE:

Q Mr. Terry, do you know what time of day you got to Mr. Busch's house?

A I would say it's sometime later than the morning, Mr. Reese, sometime around between 10:00 and 11:00 o'clock, somewhere around there, mid-morning hour.

Q And do you know when you all had learned of Mr. Busch's alleged involvement in this robbery?

A I was advised by Mr. Kearney either a day or so before. I don't know when. He had obtained the information on it that --

Q Do you know whether anybody had ever applied for a warrant for his arrest?

A No, sir, I don't.

Q Was one acquired?

A At the time he was arrested, I don't believe there was one outstanding.

Q Has one been acquired since?

A I don't know, Mr. Reese.

Q To your knowledge, has a warrant ever been requested?

A To my knowledge, it hasn't. Like I say, I don't know.

Q Were you ever told that Mr. Winters had identified Mr. Busch as a participant on January the -- Januray the 3rd or sometime in there?

A The only thing I was told, Mr. Reese, is there had been a conversation with Mr. Winters, but I wasn't advised what the conversation was.

Q You were not advised Mr. Busch had been identified at that time?

A No, sir.

Q Okay. When you went to the house and went

inside, did you and Mr. Kearney both have your guns out?

A I know Mr. Kearney had his out. I believe I had mine out. I'm not sure right now.

Q And did you point them at him when you woke him up?

A Yes, sir.

Q And where did you point it at him? Head? Foot?

A No particular -- I mean it wasn't pointed at his foot.

Q I wouldn't think so, but --

A No.

Q At his body?

A At his body, yes.

Q And how far from his body would you say the gun was when you --

A We were standing approximately two to three feet from him.

Q And your gun would have been closer yet, is that true?

A Not necessarily, no, sir.

Q Well, was it, in fact, closer to him?

A I'd say the gun was about three feet from him.

Q And was Mr. Kearney in the same location and the same distance?

A Yes, sir.

Q On opposite sides of the bed or together or --

A We were standing side by side.

Q In any event, Mr. Busch offered no resistance, is that correct?

A That's correct.

Q And when he was handcuffed and taken down, do you know where in the process his handcuffs were taken off?

A I believe they were taken off in the interview room of the robbery office.

Q At what time?

A Shortly after we got there.

Q Are you quite sure that the uniformed officers didn't transport Mr. Busch there?

A I said before I'm not sure they did not, to the best of my knowledge. It's been some time ago. To the best of my knowledge, Kearney and I probably transported him.

Q And in the interview room itself, did you and Officer Kearney and Officer Bradley have your weapons with you?

A Yes, sir.

Q And were they visible?

A They could have been, I imagine.

Q All right. Excuse me for interrupting you. Where were you wearing them? Where were they on your body?

A In a holster.

Q And where was the holster?

A On the side. Mine was.

Q And was your coat on or off?

A I assume the coat was off. I'm not real sure whether it was or not.

Q And would the same be true of Mr. Kearney?

A Yes.

Q If you recall, how about Mr. Bradley?

A I believe the same would be true of him also.

Q Did anybody else ever come in the room other than uniformed officers? I mean -- not uniformed -- officers and Mr. Busch?

A No, sir.

Q Did anybody appear to take a written statement?

A I took a written statement.

Q Was it taken electronically?

A No, sir.

Q Any video tape made of it or anything like that?

A No, sir.

Q No recording? And where in the process did Mr. Bradley leave?

A I think Mr. Bradley left shortly after he was advised of his rights.

Q Can I ask you why nobody asked for a warrant?

A I don't know, Mr. Reese. It's like I stated before, I had just received this information possibly a day or so before and due to the lack of leads that I had at the time working the robbery, I had suspended the case and at this time due to the information that had been received by Detective Kearney and Bradley, they reopened the case and I don't know why they did not request a warrant. I don't know that they didn't.

Q Did anybody make inquiry as to whether Mr. Busch -- what his mental condition was, whether he was sick, anything like that?

A From the appearances of Mr. Busch and the way he reacted and talked, he didn't appear to have any mental condition.

Q Would you answer my question? Do you know?

A No, sir.

Q What led you to believe that you had probable cause to arrest Mr. Busch?

A On the information that Detective Kearney and Bradley had obtained and it was relayed to me and --

Q And what was that?

A They said they had obtained information from a reliable source he had been involved in the robbery at the Heart of Jacksonville Motel and asked if I would assist them in going to arrest him, which I did.

Q Did they identify the reliable source?

A No, sir, not at the time.

Q And you don't know right now who it was, the reliable source was?

A I know now who it is. I didn't at the time.

Q Johnny Winters?

A Yes, sir.

Q Did he strike you as being a reliable source?

A I don't know. I've never had any dealings with Johnny Winters.

Q Are you familiar with his record?

A No, sir, not that much.

Q Do you know that he's been convicted of

several felonies, admitted to some sixty-odd robberies?

A I know that now. I didn't know it at the time.

Q Had you known at the time -- had you known it, would you have thought he was a reliable witness?

A I wouldn't say. I wouldn't know. I don't know the dealings. I don't know how well Mr. Kearney knew Mr. Winters or Mr. Bradley. I don't know whether they had any dealings with him before or not. I couldn't establish his reliability without having talked to the man myself.

Q My question is: Do you think he's a reliable witness with what you have learned of him since?

A I don't really know, Mr. Reese. I couldn't answer that yes or no.

Q You have learned since that he's killed somebody?

A Yes, sir.

Q He's threatened to kill a police officer?

A I didn't know he had threatened to kill a police officer.

Q At the Heart of Jacksonville, didn't Officer Bramlett say he said, "Don't move or I'll

kill you"?

A Yes, he said that.

Q And he has admitted some fifty or sixty robberies?

A I would -- like I say, I don't think I could answer it yes or no. The only thing I could say is if he had knowledge of the crime and could put this man in the crime, then I would say he would be reliable.

Q Would it be true to say that Mr. Busch talked to you all for some period of time and you synthecized what has been said or what your understanding of the nature of the conversation was and that some things that he said were left out?

A Like I say, the statement was not a verbatim statement, Mr. Reese. I explained that to Mr. Busch before I read the statement and I'm sure that some minor things he said were probably left out because it was not written word for word.

Q I understand that.

A Yes, sir.

Q In other words, you -- I'm not questioning you right now, but what you have here is what he said?

A Yes, sir.

Q I'm asking you if he said things that were

not in here.

A Probably, yes, sir.

MR. REESE: Your Honor, I have no further questions.

REDIRECT EXAMINATION

BY MR. WEATHERBY:

Q Mr. Terry, is there anything in the statement that he did not tell you?

A Pertaining to the robbery?

Q Right.

A No, sir.

Q Are you aware that or did you become aware or were you aware at the time of the arrest that the source that Detective Kearney was talking about who you have found out later was Johnny Winters was the person involved in the Heart of Jacksonville robbery?

A I knew it after he was arrested and I talked to him.

Q But you went along to assist Officer Kearney in the arrest?

A Yes, sir.

Q And it was your understanding that it was Officer Kearney's -- that he had the probable cause

to make the arrest, is that correct?

A Yes.

Q All right. Now, subsequent to that you have found, I believe, that it was Johnny Winters who made the statement to Detective Kearney?

A Yes, sir.

Q That Johnny Winters, in fact, confessed his participation in the Heart of Jacksonville robbery, is that correct?

A Yes.

Q And, in fact, during that statement he implicated Mr. Busch?

A Yes, sir.

Q And it has subsequently become -- has come to your attention that that is the reason that Detective Kearney went out looking for Mr. Busch; is that correct?

A Yes, sir.

MR. WEATHERBY: All right, I have no further questions, Your Honor.

Your Honor, I would offer the statement as having been voluntarily given.

THE COURT: All right, Mr. Reese.

MR. REESE: Your Honor, I would object to the statement.

THE COURT: Certainly.

MR. REESE: First, there has been no showing of a chain of possession. Secondly, there is no probable cause to arrest because -- well, then, third, that they had a chance to get a -- to go before a Court and get a warrant which they did not do; that Mr. Busch was arrested at close gunpoint, taken in handcuffs to a station and in a room with three officers who had guns and was not forcibly coerced, but was scared and that there is no showing it is voluntary and, under the circumstances, it could not have been voluntary.

THE COURT: And I assume that you do not wish to present any evidence yourself on this matter?

MR. REESE: I would like Mr. Busch to testify on this. He's not going to testify at the trial.

THE COURT: Well, I think he certainly can on the nature of voluntariness.

Can we excuse Detective Terry?

MR. WEATHERBY: Are we at the point of arguing or is Mr. Busch going to testify?

Mr. Reese.

Mr. Weatherby.

MR. WEATHERBY: Your Honor, that, of course, is the defendant's position, but I don't think that goes to the voluntariness of the confession. Mr. Busch himself acknowledged on the stand that the officers were quite gentlemanly and he was never threatened into giving a statement which is consistent with what Officer Kearney said -- excuse me -- Detective Terry said. Speaking to the motion to suppress, Your Honor, I would suggest to the Court the Florida Statutes that provide that an arrest warrant is not necessary where a police officer has probable grounds or probable cause to believe that a person is committing or about to commit a felony somewhere in the state and the statement from Detective Kearney -- from Detective Terry pertaining to the information which was available to Detective Kearney at that time was certainly sufficient probable cause to believe that Mr. Busch had involvement in it; therefore, there was sufficient

grounds for arrest, notwithstanding the lack of the issuance of an arrest warrant.

THE COURT: All right. Anything further before I rule as to the voluntariness of the statement?

MR. REESE: Your Honor, of course, I think we said earlier we would say that there was no probable cause.

THE COURT: Right. All right. considering all the evidence, including Mr. Busch's testimony, the Court would find that the statement was freely and voluntarily made and that would be therefore admissible.

All right, Gentlemen, we have the Jury, I think, all present. Would you all like a few minutes before we call the Jury in or--

MR. WEATHERBY: I'd like just a moment with Mr. Carlisle, Your Honor, and I believe we could commence as soon as the Jury gets back. I feel we should take them back into the room first.

THE COURT: All right, let's recess then for ten minutes.

(Recess.)

IN THE SUPREME COURT OF FLORIDA

Bush ?

VINCENT ANTHONY BUSH,

Petitioner,

v. DCA DOCKET NO. GG-445

STATE OF FLORIDA, SUPREME COURT CASE NO. _____

Respondent.

Docketed
3-28-78
Florida Attorney
General

PETITIONER'S BRIEF ON JURISDICTION

RECEIVED
MAR 27 1978
ATTORNEY GENERALS OFFICE

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IN THE SUPREME COURT OF FLORIDA

VINCENT ANTHONY BUSH,	:	
Petitioner,	:	
v.	:	DCA DOCKET NO. GG-445
STATE OF FLORIDA,	:	SUPREME COURT CASE NO. _____
Respondent.	:	

PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner will designate references to the opinion of the District Court, which is reproduced in full in the appendix accompanying this brief, by the symbol "A".

II STATEMENT OF THE CASE AND OF THE FACTS

Petitioner was convicted of armed robbery and sentenced under the provisions of Section 812.13(2)(a), Florida Statutes (1975). At trial the evidence established that the petitioner was present aiding and abetting his accomplice who carried a firearm during the robbery, but the evidence also established that petitioner neither possessed nor carried a firearm during the commission of the offense. The trial judge instructed the jury that petitioner could be found guilty of robbery while carrying a firearm as an aider and abettor to his accomplice (A-1).

The First District Court of Appeal affirmed petitioner's conviction and sentence for armed robbery, holding that Section 777.011, Florida Statutes (1975)(aiding and abetting), was applicable to Section 812.13(2)(a), and therefore petitioner could be found guilty of and sentenced for carrying a firearm during the commission of a robbery, even though the accomplice carried the firearm and the petitioner did not (A-1,2).

Petitioner seeks review in this Court, claiming conflict with the recent decision in Earnest v. State, 351 So.2d 957 (Fla. 1977).

III POINT INVOLVED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, HOLDING THAT A DEFENDANT CAN BE CONVICTED OF AND SENTENCED FOR ARMED ROBBERY BASED ON VICARIOUS, RATHER THAN ACTUAL, POSSESSION OF A WEAPON IS IN CONFLICT WITH EARNEST v. STATE, 351 So.2d 957 (Fla. 1977), HOLDING THAT THE MINIMUM MANDATORY THREE YEAR SENTENCING PROVISIONS OF SECTION 775.087(2), CANNOT BE APPLIED TO A DEFENDANT WHO HAS ONLY VICARIOUS POSSESSION OF A FIREARM.

IV ARGUMENT

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, HOLDING THAT A DEFENDANT CAN BE CONVICTED OF AND SENTENCED FOR ARMED ROBBERY BASED ON VICARIOUS, RATHER THAN ACTUAL, POSSESSION OF A WEAPON IS IN CONFLICT WITH EARNEST v. STATE, 351 So.2d 957 (Fla. 1977), HOLDING THAT THE MINIMUM MANDATORY THREE YEAR SENTENCING PROVISIONS OF SECTION 775.087(2), CANNOT BE APPLIED TO A DEFENDANT WHO HAS ONLY VICARIOUS POSSESSION OF A FIREARM.

The issue is whether the District Court correctly applied the aider and abettor provisions of Section 777.011, Florida Statutes (1975), to petitioner who was an accomplice to an armed robbery but who did not carry a firearm during the commission of the offense. This Court's jurisdiction is invoked because the decision of the District Court applies a theory of vicarious possession in a manner inconsistent with the decision of this Court in Earnest v. State, 351 So.2d 957 (Fla. 1977).

The issue in Earnest was whether the aider and abettor statute could be invoked to make applicable Section 775.087(2), Florida Statutes (1975), imposing a minimum mandatory three year sentence on persons convicted of robbery and who had in their "possession" a firearm. On direct appeal to the First District Court it was held as follows:

> "Convicting, the jury found a nexus between appellant's knowing conduct and her companion's firearm. The jury finding that appellant committed armed robbery is sufficient also, as the trial court held, to demonstrate her vicarious possession of the firearm for purposes of Section 775.087(2):" 342 So.2d 1024, 1025 (Fla. 1 DCA 1977).

This Court accepted jurisdiction on the basis of a certificate of great public interest and reversed the First District in Earnest v. State, 351 So.2d 957 (Fla. 1977), holding:

> "Petitioner's challenge to her sentence is predicated on an asserted ambiguity in the phrase 'in his possession'. She suggests that the phrase may or may not include vicarious possession, and argues that for this precise reason we are obliged to construe the statute strictly - to exclude vicarious possession - in favor of the accused. She basically relies on Section 775.021(1), Florida Statutes (1975), and on State v. Wershow, 343 So.2d 605 (Fla.1977). In Wershow we reiterated the principle expressed in Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927):
>
> '"'The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms. . ..'"'
>
> We agree that the term 'possession'

> does not clearly encompass vicarious possession, and we agree that petitioner is entitled to the benefit of the doubt. The Legislature has not unequivocally expressed an intention to require three year mimimum sentences for all persons who participate in one of the enumerated criminal adventures." (Footnotes omitted) 351 So.2d at 958, 959.

In petitioner's case the same principle applied by this Court in Earnest should have been controlling. The petitioner was convicted under Section 812.13(2)(a), which states:

> "If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment. . . ." (Emphasis added).

As found by the District Court, petitioner did not carry a firearm. He should have been sentenced under the provisions of Section 812.13(2)(c), which states:

> "If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree. . . ." (Emphasis added).

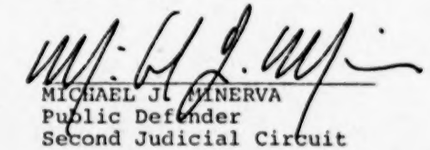
As this Court held in Earnest v. State, supra, a criminal statute must be construed strictly and nothing is to be regarded as included within it that is not clearly and intelligently described. The provisions of Section 812.13(2)(a),

fixing the penalty for armed robbery, do not clearly and unambiguously apply to vicarious as well as the actual carrying of a firearm. As in Earnest, petitioner should have received the benefit of the doubt concerning the scope of the statute. To hold otherwise would mean that even though the statute imposes a penalty on "the offender [who] carried a firearm", it can be applied to the "offender" who had not "carried" a firearm, through the ambiguous vehicle of vicarious possession.

It is submitted that the decision here is violative of the rule espoused in Earnest and that the Court therefore has jurisdiction because there is a real conflict of decisions. See, Fla. R. App. P. 9.030(a)(2)(A)(iii), and Article V, Section 3(b)(3), Florida Constitution.

In addition to the technical grounds of jurisdiction, which are clear, the issue raised here is one which should be authoritatively settled by this Court because it involves an interpretation of an important state statute with the potential difference in penalties ranging from life imprisonment to a maximum of 15 years. Petitioner urges the Court to accept jurisdiction and resolve the conflict.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

PETITIONER'S REPLY BRIEF

QUESTION PRESENTED

WHETHER THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICERS TO ARREST SUSPECTS IN THEIR HOMES WHEN NO WARRANT HAS BEEN OBTAINED AND THERE ARE NO EXIGENT CIRCUMSTANCES DEMONSTRATED EXCUSING THE ABSENCE OF AN ARREST WARRANT.

ARGUMENT

In an effort to avoid the jurisdiction of this Court the state suggests that the federal issue was not properly preserved.

The record in support of the Petition includes portions of petitioner's brief filed in the First District Court of Appeal. The federal issue not only was presented to that court by that brief but the Attorney General in its brief conceded that the issue was properly before the court. In its argument in the District Court the state said:

> Although an examination of the record reveals that trial counsel failed to particularize this claim in the fashion as framed on appeal, the allegations in the amended motion ".... the statement was illegally obtained without a warrant ..." and the argument of counsel that "... they had a chance to get a-- to go before a Court and get a warrant which they did not do ..." (TR 121) is probably adequate to present the matter for appellate review. This is particularly true since counsel for the State urged that under Florida Statutes an arrest warrant is not necessary to perfect an arrest where a police officer has probable cause to believe a felony has been committed (TT 133). (State's Brief at 4.)
> (A copy of the state's brief in the District Court is attached as an appendix)

The state did not attempt to transfer jurisdiction of the appeal to the Florida Supreme Court but conceded that the issue was sufficiently raised to "present the matter for appellate review".

The state is complaining here that the federal issue should have been raised by attacking the constitutionality of Section 901.15, Florida Statutes (1975) which permits arrests on probable cause without an arrest warrant. In the trial court the petitioner's counsel raised the Fourth Amendment issue in another way. A motion was filed to suppress petitioner's confession on grounds, among others, that it was obtained "without a warrant". The testimony of one of the arresting officers established that the police made no effort to obtain a warrant. In argument on the motion petitioner's counsel asserted that the police had a chance to go before a court for a warrant but failed to do so.

By the motion to suppress alleging that the statement of petitioner was obtained without a warrant the state was put on notice that the issue of exigent circumstances might arise at the hearing. The state offered no evidence to establish exigent circumstances.

After the motion to suppress had been denied and petitioner convicted, jurisdiction for the appeal lay only in the District Court of Appeal. Article V, Section 4(b)(1), Florida Constitution. The Supreme Court of Florida did not have jurisdiction

because the trial court did not "initially and directly [pass] on the validity of a state statute ....". Article V, Section 3(b)(1), Florida Constitution. A further appeal from the District Court to the Florida Supreme Court, raising a constitutional issue, would not have been permitted. Cf. Silver v. State, 188 So.2d 300 (Fla. 1966).

It is unfortunate that respondent's brief has clouded consideration of the constitutional issue by embroiling this Court needlessly in the intricacies of Florida appellate law. But since respondent has opened this door petitioner must close it to insure consideration of the properly presented constitutional claim.

In State v. Perez, 277 So.2d 778 (Fla. 1973), the Florida Supreme Court reviewed a decision of the Second District Court of Appeal in Perez v. State, 267 So.2d 33, which invalidated a search incident to a warrantless arrest of the defendant at his home. After analyzing this Court's opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Florida Supreme Court concluded that the majority opinion pertaining to the necessity of obtaining an arrest warrant was dicta and therefore refused to "extend the application of Coolidge beyond its actual holding ....". 277 So.2d at 783. The court also said:

> The District Court of Appeal erred in reversing respondent's conviction and discharging respondent on the ground that the arresting officers had ample time to obtain an arrest warrant and erred in qualifying the language of the statute to exclude arrests in dwelling houses in the nighttime. There is no such exception set out in the statute. The arrest of respondent was lawful pursuant to Section 901.15(3), Florida Statutes, F.S.A.
> 277 So.2d at 783

In petitioner's case the same issue arose. Since the Florida Supreme Court had, in 1973, unanimously rejected the argument that a warrant was necessary to arrest a defendant at his home, there was no basis for making that same argument to the same court, especially when there was no intervening

decision to the contrary from this Court. The jurisdiction of the Florida Supreme Court to hear direct appeals from trial courts is limited to review of orders of trial courts "initially and directly" passing on the validity of a statute. Article V, Section 3(b)(1), supra. Had a direct appeal been taken from the trial court to the Florida Supreme Court urging the invalidity of Section 901.15, jurisdiction might not have been accepted because the constitutional issue had already been resolved in Perez. Simmons v. State, 354 So.2d 1211 (Fla. 1978); Daytona Beach Racing and Recreational Facilities District v. Volusia County, 355 So.2d 175 (Fla. 1st DCA 1978); State v. Opitz, 357 So.2d 469 (Fla. 2d DCA 1978). Jurisdiction was accepted by a district court in Opitz even though the trial judge ruled that Section 775.087(2), (Su... 1976), was unconstitutional. The district court said that the Florida Supreme Court had recently ruled that the statute was constitutional in Sowell v. State, 342 So.2d 969 (Fla. 1977), and therefore "the trial court's ruling as to constitutionality is merely colorable and presents no substantial constitutional issue. Therefore, appellate jurisdiction is properly in this court rather than in the Supreme Court." State v. Opitz, supra, 357 So.2d at 470 n. 1.

This holding followed from an earlier decision of the Florida Supreme Court in Massachusetts Bonding and Insurance Co. v. Bryant, 189 So.2d 614, 616 (Fla. 1966), when the court said:

> Although we have held that a decision "initially" passing upon a constitutional question as specified in Section 4 of Article V of the Constitution, F.S.A., applies only to an original such determination in immediate litigation, State v. Furen, 118 So.2d 6 (Fla. 1960), we qualified the statement by restricting its application to like decisions by the same or other District Courts of Appeal. The pronouncement should not be strained to mean that a litigant could challenge the validity of an act which had already been held valid by this court and use that as a vehicle to secure another determination

of the issues of his case under the familiar ruling that once this court assumes jurisdiction, it will consider the entire case, merits and all. (Emphasis added)

For these reasons the petitioner was properly before the First District Court of Appeal with his Fourth Amendment claim.

Of course the Florida Supreme Court could have acquired jurisdiction by certification of the question as being one of great public interest. Article V, Section 3(b)(3), Florida Constitution. This alternative was presented to the District Court in petitioner's reply brief, portions of which are included in the Appendix to this brief. Petitioner presented this point to the District Court as follows:

> Even if this Court is bound by the holding in Perez, it is permissible to certify the question to the Florida Supreme Court as one of great public interest. In Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973) the Supreme Court suggested this procedure, stating:
>
> "This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court."
>
> (Petitioner's Reply Brief at 2)

When the District Court decided the issue, however, it did so on the basis of Perez but without certification of the question. Petitioner then had no avenue to present this issue to the Florida Supreme Court, because there was no conflict between the District Court decision and any other appellate decision on that point of law. The only arguable ground of jurisdiction was the point presented in the petitioner's jurisdictional brief, raising a ground of state law. Petitioner has not tried to mislead this Court, as suggested by respondent, by claiming that the constitutional issue was presented to the Florida Supreme Court. It was not, because there was no colorable jurisdictional claim to make to the Florida Supreme Court. The Florida Supreme Court

does not possess discretionary review of decisions from district courts of appeal. The Supreme Court may review only a decision of a district court that "affects a class of constitutional or state officers that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law ....". Article V, Section 3(b)(3), Florida Constitution.

Petitioner was following state law in presenting his constitutional claim to the First District Court of Appeal rather than the Florida Supreme Court. The presence of a constitutional issue does not automatically vest jurisdiction in the Florida Supreme Court, as was made plain in Dykman v. State, 294 So.2d 633 (Fla. 1974), when the court said:

> The jurisdiction of this Court on direct appeal from an order of a trial court is governed by the provisions of Article V, §3(b)(1) of our constitution. This section provides that the Supreme Court shall hear appeals from final judgments and orders of trial courts "initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution." Although our direct appeals jurisdiction includes cases in which the trial court inherently passes upon the constitutionality of a statute, we may not accept a direct appeal based upon an inherent construction of a constitutional provision; it is insufficient to invoke our direct appeals jurisdiction that there was an inherent construction of a constitutional provision in the judgment appealed from, but rather there must be an express ruling by the trial court which explains, defines, or overtly states a view which eliminates some existing doubt as to a constitutional provision in order to support a direct appeal.[2] Our direct appeals jurisdiction is not properly invoked merely because the trial court may apply a constitutional provision to the facts before it, but rather is properly invoked as to construction of a constitutional provision only where the trial court has expressly construed the constitutional provision involved.[3] With these principles in mind, we shall examine the several issues raised on appeal to determine if our direct appeals jurisdiction has been properly invoked.
>
> Id. at 634,35 (Footnotes omitted)

The issue raised by petitioner in trial and appellate courts was one of interpretation of a provision of the federal constitution. The Florida Supreme Court did not have jurisdiction to hear the appeal nor to consider the decision affirming the conviction by the First District Court of Appeal in the absence of a certificate of great public interest. Petitioner did all that was required under Florida law to preserve and present his federal constitutional claim for adjudication by the highest court in the state having jurisdiction to consider that claim. He should not be denied review in this court because the state disagrees with the manner in which the constitutional issue was presented. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 237 n.1, 19 L.Ed.2d 438, 441 (1967); Williams v. Florida, 399 U.S. 78, 80 n.5, 26 L.Ed. 2d 446, 449 (1970).

Overlooked by respondent is the importance of the issue and the clearcut ruling by the Florida Supreme Court in Perez that a warrant is not necessary to arrest a suspect in the privacy of his home. In attempting to minimize the Perez holding the respondent contends that "Florida law, although authorizing warrantless arrests of persons do [sic] not allow forcible entry into a building, Section 901.19, Florida Statutes ...." (State's response at 7). Contrary to that statement, the cited statute authorizes a peace officer to use "all necessary and reasonable force to enter any building where the person to be arrested is or is reasonably believed to be". The only predicate for the officer's use of this force is first to announce his authority and purpose. This force may be used when the officer is making an arrest either with or without a warrant.

Florida law, therefore, authorizes forcible intrusions into suspect's homes either in the daytime or nighttime without warrants and without exigent circumstances making it impracticable to obtain a warrant. This important issue is appropriately before the Court in this case and should be resolved. Petitioner urges

this Court to issue a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been hand delivered to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to the petitioner, Mr. Vincent Anthony Bush, #054109, Cross City Correctional Institution, P. O. Box 1500, Cross City, Florida 32628, this 8th day of December, 1978.

MICHAEL J. MINERVA

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

VINCENT ANTHONY BUSCH,

APPELLANT,

-VS-

CASE NO. GG-445

STATE OF FLORIDA,

APPELLEE.

BRIEF OF APPELLEE

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

VINCENT ANTHONY BUSCH, *
APPELLANT, *
-*VS*- * CASE NO. GG-445
STATE OF FLORIDA, *
APPELLEE. *

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee accepts the Statement of the Case as stated on page two of Appellant's brief.

STATEMENT OF THE FACTS

Appellee accepts the Statement of the Facts as stated on pages three through ten of Appellant's brief except that portion wherein Appellant states he objected to the court instructing the jury on principals. The objection was not to the giving of the charge but to not reinstructing the jury on the charges (TT 239).

Other facts deemed relevant to a disposition of the issues raised on this appeal will be included in the argument portion of this brief.

POINTS ON APPEAL

POINT I

THE TRIAL JUDGE SHOULD HAVE SUPPRESSED APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT.

POINT II

THE COURT ERRED BY INSTRUCTING THE JURY THAT APPELLANT COULD BE FOUND GUILTY OF ROBBERY COMMITTED WHILE CARRYING A FIREARM WHEN THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE FIREARM WAS IN THE POSSESSION OF APPELLANT'S ACCOMPLICE: AND THE JUDGMENT AND SENTENCE FOR ARMED ROBBERY ARE NOT SUPPORTED BY THE EVIDENCE.

POINT I

THE TRIAL JUDGE SHOULD HAVE SUPPRESSED APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT.

ARGUMENT

Appellant contends the trial judge erred in denying his motion to suppress the confession because the initial arrest was invalid because it was effectuated without an arrest warrant.

Although an examination of the record reveals that trial counsel failed to particularize this claim in the fashion as framed on appeal, the allegations in the amended motion ". . . the statement was illegally obtained without a warrant. . ." and the argument of counsel that ". . . they had a chance to get a--to go before a Court and get a warrant which they did not do. . ." (TR 121) is probably adequate to present the matter for appellate review. This is particularly true since counsel for the State urged that under Florida Statutes an arrest warrant is not necessary to perfect an arrest where a police officer has probable cause to believe a felony has been committed (TT 133).

Of course, even assuming the arrest was illegal because no warrant was secured, that does not mean the confession was not freely and voluntarily given and therefore inadmissible, and contrary to Appellant's claim *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed.2d 416 (1975) does not so hold. In *Brown*, supra, the Supreme Court rejected the notion that Miranda warnings alone would automatically purge the taint of an illegal arrest[1], but nonetheless held:

> ". . . It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. . . ." 422 U.S. at 603

The Supreme Court in *Brown* rejected the notion that the Miranda warnings *alone* and per se removed the taint of the primary illegality *but* it also rejected the "but for" rule as well, and held each case had to be decided on its own facts.

There is *nothing* in the record before the trial judge that the statement was induced as a result of the illegal arrest, and holding that suppression was required would be an application of the "but for" rule rejected in *Brown*, supra. Indeed,

---

[1] The arrest was found to be without probable cause by the Illinois Supreme Court.

the *uncontradicted* testimony was that it was given freely and voluntarily after Appellant was warned of his rights and indicated he understood those rights (TT 98,101,105, Exhibit A), and the trial judge expressly found the statement was freely and voluntarily given (TT 134). Even Appellant's testimony supports the finding that his statement was given freely and volunitarily.

In *Brown* the testimony established that the illegality of the arrest was purposeful by the officers and the impropriety thereof was obvious. Moreover, the court found the arrest was purely investigatory. In this case the arrest was lawful as far as the officers were concerned based upon *State v. Perez*, 277 So.2d 778 (Fla. 1973), *cert.denied* 38 L.Ed.2d 468 (1973), and there is no testimony that it was purely for investigative purposes. Consequently, there is is a factual basis before the trial judge from which she could reasonably have found the statement was the result of a voluntary exercise of free will and independent of the illegal arrest, *assuming* the arrest was illegal. *Jetmore v. State*, 275 So.2d 61 (Fla.4th DCA 1973).

Appellant, citing to a host of decisions rendered by the United States Supreme Court which declined to answer the issue, e.g., *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38 (1976); and *Coolidge v.*

New Hampshire, 403 U.S. 443 (1971), contends the arrest was illegal.

The Florida Supreme Court in *State v. Perez*, supra, rejected the very argument advanced herein notwithstanding *Coolidge v. New Hampshire* and the implications thereof. The Court did so on the basis of Section 901.15, Fla.Stat., which authorizes an arrest without a warrant if an officer has probable cause to believe a felony has been committed and the person to be arrested has committed it. The Court said:

> "Section 901.15, Florida Statutes, F.S.A., does not say that the arrest thereby authorized cannot be made in the arrested person's home in the nighttime without a warrant if the officer had opportunity to obtain a warrant.
>
> "The Supreme Court of the United States has opined that absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest. Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L. Ed. 1663 (1948), United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).
>
> "We recognize that the Supreme Court of the United States in the majority opinion written in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in an attempt to refute Justice White's dissent therein did discuss as obiter dicta, the necessity for warrants in general both in the case of arrests and in the case of search and seizure. However, in *Coolidge*, there was no question as to the validity of the arrest of defendant in his home on the charge of murder, but rather the case turned upon whether there had been a lawful search and seizure of petitioner's automobile since the warrant for the search and seizure of his automobile did not satisfy the requirements of the Fourth Amendment--whether a warrantless search was justifiable under the given circumstances of the case. That court explicated that the basic constitutional rule is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate,

are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions [citing Katz v. United States, 389 U.S. 347, at 357, 88 S.Ct. 507, 19 L. Ed.2d 576]. The exceptions are "jealously and carefully drawn" and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."' considering the three theories proposed by the state to bring the search of the automobile within one or another of the exceptions to the warrant requirement, the court discounted all three theories and found that the seizure of the car in the driveway could not be justified as incidental to the arrest which took place inside the house, that the argument of the state to the effect that police may make a warrantless search of an automobile whenever they have probable cause to do so was without merit since the police for some time had known of the probable role of the car, the petitioner had had ample time to destroy incriminating evidence, the house was guarded, and petitioner had no access to the car--hence, there were no exigent circumstances justifying a warrantless search. As to the third theory of the state that the car itself was an instrumentality of the crime and as such might be seized because it was in plain view, the court responded that under the circumstances present in *Coolidge*, the plain view exception could not justify the seizure of defendant's automobile. With regard to this position by the state, the court explicated, inter alia,

> 'The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves.'

"Subsequent to deciding the issue before it as above explained, the majority in an attempt to refute Justice White's dissent went into a lengthy discourse on warrants in general. It is in this section of the opinion that the court discussed warrantless arrests. Justice Harlan points out in his concurring opinion that the court again leaves open the issue of a warrantless entry into a man's home to arrest him on probable cause.

"The Supreme Court posited a question similar to the one before us in the following language, at 480, 91 S.Ct. at 2045,

> 'Indeed, if Mr. *Justice White* is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination "would confront us with a grave constitutional question, namely, whether the *forceful* nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." Jones v. United States, 357 U.S. at 499-500, 78 S.Ct. [1253], at 1257 [2 L.Ed.2d 1514].' (Emphasis supplied.)

and replied to this proposition as follows,

> 'None of the cases cited by Mr. *Justice White* disposes of this "grave constitutional question." The case of Warden v. Hayden [387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782], supra, where the Court elaborated a "hot pursuit" justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. . . . *But we find it unnecessary to decide the question in this case.* The rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." [Katz v. United States, supra] is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest.' (Emphasis supplied.) at pp. 480-481, 91 S.Ct. at pp. 2045-2046.

> "We will not extend the application of *Coolidge* beyond its actual holding, and we are by no means persuaded that the position we took in *Falcon*, and the reasoning upon which it was based, are no longer valid." 277 So.2d at 781-783

See also: *Collins v. State*, 310 So.2d 33 (Fla.2d DCA 1975).

State v. Perez, supra, is controlling precedent and this Court is bound to follow the case law set forth by that decision, *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), in the absence of a definitive holding to the contrary by the Florida Supreme Court or the United States Supreme Court. Of course, Appellant has acknowledged that the Supreme Court has not rendered such a holding and *State v. Perez* supra, has not been overruled.

It should be understood that this was not a nighttime or forceful entry into the home, such as existed in *Jones v. United States*, 357 U.S. 493 (1958), which involved a warrantless search and seizure. The officers in question knocked on the door, identified themselves and were admitted into the home at approximately 11:00 a.m. (TT 95).

Appellant's claim that the United States Supreme Court "will" hold warrantless arrests invalid is nothing more than speculation as to what the Court will do in the future. Justice White's opinion in *Watson* which traces the history of warrantless arrests is a strong case to the contrary. Consequently, Appellee will not speculate on what that Court will or will not do in some future case. The point is that the existing law is that the trial judge was correct in rejecting the argument that the arrest was illegal. Since the arrest was lawful under the statutes and decisional law of the State of Florida, there was no primary illegality that could taint the

Appellant's otherwise free and voluntary confession and the trial judge properly denied the motion to suppress.

Appellant implies that there was an absence of probable cause but really doesn't argue the matter (App's brief at 35). The fact that the "informer", who was actually Johnny Winters (TT 116), took the Fifth Amendment at trial has nothing to do with his reliability at the time he gave the information to Detectives Kearney and Bradley. The ". . . floundering testimony of Officer Terry. . ." (App's brief at 35) made it clear that Winters had confessed to his participation in the robbery and implicated Appellant (TT 120). It is therefore apparent that sufficient reliability existed since Winter's statements constituted admissions against penal interest. *United States v. Harris*, 403 U.S. 573 (1971); *State v. Jacobs*, 320 So.2d 45 (Fla.2d DCA 1975). Inasmuch as Winters confessed to committing the robbery, it is obvious that he had personal knowledge of what he spoke and the "two pronged" test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) were met. Interestingly, when asked on cross-examination whether he thought Winters was reliable, Officer Terry said: ". . . The only thing I could say is if he had knowledge of the crime and could put this man in the crime, then I would say he would be reliable. . . ." (TT 118) Obviously the trial judge agreed with Officer Terry's "floundering testimony", and Appellant has not demonstrated that he erred in doing so. Indeed, he has not even attempted to do so except by saying

the officers should have had the probable cause determined before they arrested him, not afterwards.

The warrantless arrest was reasonable under the circumstances of this case and the fact that they could have secured a warrant but did not, does not render the arrest invalid. *State v. Perez*, supra.

POINT II

THE COURT ERRED BY INSTRUCTING THE JURY THAT APPELLANT COULD BE FOUND GUILTY OF ROBBERY COMMITTED WHILE CARRYING A FIREARM WHEN THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE FIREARM WAS IN THE POSSESSION OF APPELLANT'S ACCOMPLICE; AND THE JUDGMENT AND SENTENCE FOR ARMED ROBBERY ARE NOT SUPPORTED BY THE EVIDENCE.

ARGUMENT

Appellant, relying upon *Earnest v. State*, ___ So.2d ___ (Fla. 1977), Case No. 51,491, Opinion filed August 31, 1977, rehearing pending, contends the verdict and sentence entered thereon are not supported by the evidence because Johnny Winters was the person who was armed with the firearm during the robbery and the evidence does not show that he was personally armed.

Appellee agrees there is absolutely no evidence to show Appellant was armed and thus his role was limited to tying up the victims in the back room and collecting the money from Ms. Cotes (TT 154-155). Appellee respectfully suggests, however, that *Earnest* does not apply herein, because Appellant was not sentenced to three years mandatory imprisonment for "possession" of a firearm pursuant to Section 775.087 (2), Fla.Stat., which is what was involved in *Earnest*.

The jury was properly instructed pursuant to §777.011, Fla.Stat., which provides:

> Principal in first degree.--Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids,abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

The evidence shows that Appellant did several overt acts in aiding Winters in the commission of the *armed* robbery and there is absolutely nothing in *Earnest* to suggest §777.011 does not apply to a prosecution under Section 812.13, Fla.Stat. Indeed, if §777.011 does not apply, how could Appellant be guilty of unarmed robbery, as he suggests, for there is nothing in the record to show he threatened or coerced Ms. Cotes to turn over the money to him? The truth of the matter is that Appellant is guilty of armed robbery--absent a jury pardon--or he is not guilty of anything because he could only be guilty as an aider and abettor to Winters and the uncontradicted testimony is that Winters was armed. That this is correct, this Court need only look to the fact that in *Earnest* the appellant was in fact convicted for "armed robbery" even though she did not have possession of the firearm.

Under Section 812.13 a person cannot be convicted of just "robbery", he or she must be convicted of either robbery with a firearm or deadly weapon; robbery with a weapon or robbery

without a firearm or weapon. Since Appellant did not exert any force or threaten Ms. Cotes, he could only be convicted as an aider or abettor to Winters. Since Winters was armed, Appellant could be charged, convicted and punished to the same degree as Winters, except with regard to the three-year minimum mandatory sentence.

While the Supreme Court felt there was a doubt that the Legislature intended to apply the aiding and abetting statute to Section 775.087(2), Fla.Stat., which is a special *sentencing* statute, that does not suggest that there is any question that the Legislature intended the aiding and abetting statute to apply to the robbery statute, which is a *substantive crime* and not simply a sentencing statute. Indeed, Section 777.011 applies to all substantive crimes by its very terms for it states ". . . whoever commits *any criminal offense. . .*" or aids or abets the commission of such offense may be charged, convicted, and punished as a principal in the first degree.

Chapola v. State, 347 So.2d 762 (Fla.1st DCA 1977), has nothing to do with this case for the Appellant was charged with armed robbery (R 1). In *Chapola*, the appellant was merely charged with robbery without alleging the type of robbery.

The judge properly instructed the jury on principals--to which Appellant did not object other than that the whole charges should have been given (TT 239)--and the evidence supports the verdict.

CONCLUSION

For the reasons stated hereinabove, the judgment and sentence should be affirmed.

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Michael J. Minerva, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 8th day of December, 1977.

Raymond L. Marky
Raymond L. Marky
Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

VINCENT ANTHONY BUSCH,

Appellant;

v. CASE NO. GG-445

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

MICHAEL J. MINERVA
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ATTORNEY FOR APPELLANT

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

VINCENT ANTHONY BUSCH, :

Appellant, :

v. : CASE NO. GG-445

STATE OF FLORIDA, :

Appellee. :

REPLY BRIEF OF APPELLANT

I ARGUMENT

POINT I

WHETHER THE TRIAL JUDGE SHOULD HAVE SUPPRESSED THE APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT (This point arises from assignment of error no. 5).

The appellant recognizes that the decision of the Florida Supreme Court in State v. Perez, 277 So.2d 778 (Fla. 1973) is currently the law in this state. However it is appellant's position that an authoritative construction of the Fourth Amendment by the United States Constitution is yet to be made on this subject and that in order to preserve this issue it is necessary that the appellant assert

this position in this Court. The State has graciously conceded that the issue was raised in the trial court so it is properly presented here.

Even if this Court is bound by the holding in Perez, it is permissible to certify the question to the Florida Supreme Court as one of great public interest. In Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973) the Supreme Court suggested this procedure, stating:

> "This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court."

It is appellant's position, therefore, that the ultimate authority on the issue raised here will be the Supreme Court of the United States pursuant to the authority vested in it under Article VI, Paragraph 2 (The Supremacy Clause) and the Fourth Amendment of the United States Constitution made applicable to the states through the Fourteenth. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081 (1961).

The State has also raised the issue of whether the confession would have been admissible, even if the arrest was illegal, because it was not the product of illegal custody. Appellant challenges this contention and asserts

that because the statement was made within a short period of time after the arrest, and there was no evidence that any outside influence purged the taint of the illegal custody, the ensuing statement was tainted.

The conduct of the police in this case in invading the appellant's home without first attempting to seek permission from a magistrate is a sufficient Fourth Amendment violation to bring this case within the rule of Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975).

POINT II

WHETHER THE COURT ERRED BY INSTRUCTING THE JURY THAT THE APPELLANT COULD BE FOUND GUILTY OF ROBBERY COMMITTED WHILE CARRYING A FIREARM WHEN THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE FIREARM WAS IN THE POSSESSION OF THE APPELLANT'S ACCOMPLICE; AND WHETHER THE JUDGMENT AND SENENTCE FOR ARMED ROBBERY ARE SUPPORTED BY THE EVIDENCE (This point arises from assignments of error numbered 1,2,3,4, and supplemental assignments of error numbered 1 and 2).

Appellant disagrees with the State's contention on page 2 of its brief that appellant's counsel did not object to the giving of the charge, but rather objected to not reinstructing the jury on all charges.

The entire colloquy from pages 235 through 239 of the transcript indicates that appellant's counsel took the position that unless the court reinstructed the jury on the entire charges, it would be error to give the instruction on principals alone. After the court had given the single instruction appellant's counsel clarified his position, with which the court agreed, stating:

> "Your Honor, just for the record, I will object to the charge as given, that it pinpoints something that -- the whole charge should have been given or the jury instructed to reach a verdict if they can with the law that they had." (Emphasis added) (TR-239).

Therefore, the appellant's counsel did object to the instruction as given.

The State does not directly refute appellant's argument that the accomplice instruction was inapplicable and the evidence insufficient as to armed robbery. Rather the State attempts to limit the Supreme Court's decision (now final) in Earnest v. State, _____ So.2d _____ (Fla. 1977) Case No. 51,491, rehearing denied December 6, 1977, to apply only to a sentencing statute.

Appellee disagrees because; (1) there is no legal basis for making this distinction, and the Supreme Court did not restrict its language in that manner; (2) the Court's decision strictly construing Section 775.087(2) in Earnest rested upon its earlier holding in State v. Wershow, 343 So.2d 609 (Fla. 1977) declaring a substantive (not sentencing) statute void for vagueness and (3) the robbery statute under consideration is also, in effect, a sentencing statute.

To explain the third reason, appellant notes that robbery is now defined and prohibited as follows:

> "(1) 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
>
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) An act shall be deemed 'in the course of committing the robbery' if it occurs in an attempt to commit robbery or in flight after the attempt or commission." Section 812.13, Florida Statutes (1975).

The substantive offense is defined in subsection (1). The penalty is dependent upon what is "carried" by "the offender".

It is not a destruction of the statute for principals in the same robbery to be subject to different degrees of punishment, according to whether they personally "carried" some weapon. Indeed, this construction is in harmony with, if not mandated by, the holding in Earnest.

The State's argument that Section 777.011, relating to principals, requires that all participants be punished equally, is indirectly refuted by State v. Dixon, 283 So.2d 1, 11 (Fla. 1973) when the Court construed almost identical language in an earlier version of the statute and said:

". . .Fla. Stat. &776.011, F.S.A., provides,

> 'Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.'

The effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of principal in the first degree in Fla. Stat. § 776.011, F.S.A., and in the repealed Fla. Stat. §782.04, F.S.A.

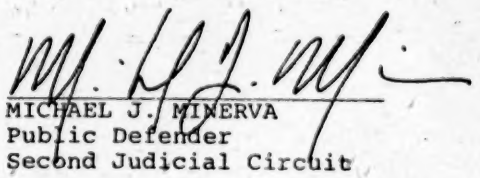
The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree." 283 So.2d at 11.

It is equally obvious that the Legislature had the same intent when enacting the new robbery statute; that the principal theory would not apply to the penalty provisions. At least there is ambiguity here, and under Earnest the appellant is entitled to the benefit of the doubt.

The State has agreed there was no evidence that appellant was armed (State's brief at 13). Thus, his participation in the acts constituting robbery, as defined under Section 812.13(1), was sufficient to establish guilt, either as an aider and abettor, or as a principal in the first degree (tying up victims and taking money). But, as to the degree of guilt, appellant's culpability was limited to a felony of the second degree under Section 812.13(2)(c) because he was an "offender [who] carried no firearm, deadly weapon, or other weapon. . . ."

The error in giving the instruction on principals, especially pertaining to guilt of armed robbery, was aggravated by the isolated charge given in response to the jurors' specific question on this point. The evidence supported neither the instruction nor the verdict and reversal is required.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been hand delivered to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. Vincent Anthony Busch, #054109, Cross City, Correctional Institution, P.O. Box 1500, Cross City, FL 32628, this 12th day of December, 1977.

MICHAEL J. MINERVA

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE DISTRICT COURT OF APPEAL,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

JURISDICTION

Respondent acknowledges that jurisdiction, to the extent that the facts and circumstances of this case present a substantial federal question, would arise pursuant to 28 *U.S.C.* §1257(3). Respondent denies any evidence was secured as a result of an illegal arrest. A statement was taken from Petitioner after his arrest which was freely and voluntarily given after appropriate warnings (R 32), and the motion to suppress, quoted on page 3 of the petition, never alleged the statement was illegally obtained because it was the product of the warrantless arrest. Indeed, Petitioner in his motion to suppress never alleged the arrest was illegal because it was effected without a warrant and without probable cause.

QUESTION PRESENTED

WAS THE ARREST OF THE PETITIONER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE A VIOLATION OF THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION.

STATUTORY PROVISIONS INVOLVED

901.15 When arrest by officer without warrant is lawful.—A peace officer may arrest a person without a warrant when:
(1) The person has committed a felony or misdemeanor or violated a municipal ordinance in the presence of the officer. Arrest for the commission of a misdemeanor or violation of a municipal ordinance shall be made immediately or in fresh pursuit.

(2) A felony has been committed and he reasonably believes that the person committed it.

(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.

901.17 Method of arrest by officer without warrant.—A peace officer making an arrest without a warrant shall inform the person to be arrested of his authority and the cause of arrest except when the person flees or forcibly resists before the officer has an opportunity to inform him or when giving the information will imperil the arrest.

901.19 Right of officer to break into building.—
(1) If a peace officer fails to gain admittance after he has announced his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

901.21 Search of person arrested.—
(1) When a lawful arrest is effected, a peace officer may search the person arrested and the area within the person's immediate presence for the purpose of:
(a) Protecting the officer from attack;
(b) Preventing the person from escaping;or
(c) Discovering the fruits of a crime.
(2) A peace officer making a lawful serach without a warrant may seize all instruments, articles, or things discovered on the person arrested or within the person's immediate control, the seizure of which is reasonably necessary for the purpose of:
(a) Protecting the officer from attack;
(b) Preventing the escape of the arrested person; or
(c) Assuring subsequent lawful custody of the fruits of a crime or of the articles used in the commission of a crime.

STATEMENT OF THE CASE

Respondent accepts the Statement of the case as stated on pages two through seven of Petitioner's brief. Additional facts however are necessary to clarify the posture of this case.

Counsel for Petitioner was not trial counsel and the latter did not present the issue that was presented to the appellate court. Counsel for the State in answer to trial counsel's observation that the State ". . . Had a chance to get--to go before a court and get a warrant which they did not do. . ." (Pet. R 40) stated that the laws of Florida did not require an arrest warrant where a police officer has probable cause to believe the person has committed a felony (Resp. R 31). Trial counsel did not challenge the validity of Section 901.15, Florida Statutes, either on its face or as applied, which would have authorized an appeal to the Florida Supreme Court under Florida's Constitution, thus giving the Florida Supreme Court an opportunity to re-examine *State v. Perez*, 277 So.2d 778 (Fla.1973), *cert. den.*, 414 U.S. 1064 in light of both *United States v. Watson*, 423 U.S. 411 (1976) and *United States v. Santana*, 427 U.S. 38 (1976). Indeed, all trial counsel urged in response was that ". . . there was no probable cause. . ." (Resp. R 32).

On appeal counsel for Petitioner raised the question tendered but again did not contest the validity of Section 901.15, Florida Statutes, either on its face or as applied, which could have resulted in review by the Florida Supreme Court. *Snedeker v. Vernmar Ltd.*, 151 So.2d 439 (Fla.1963). By not specifically raising in the trial court the issue pressed in the district court of appeal and before this Court, existence or nonexistence of exigent circumstances was not explored or developed on the record. In short counsel for Petitioner reframed the issues in order to present the question tendered herein.

What Petitioner fails to point out to this Court is that the district court of appeal under Florida law was required to affirm on the basis of *State v. Perez*, supra, whether they agreed with the Florida Supreme Court or not, *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973) because that court is bound to follow the case law set forth by said decision in the absence of a definitive holding to the contrary by the Florida Supreme Court or this Court.

Petitioner implies that the Flroida Supreme Court had an opportunity to re-examine *Perez* because he sought review in the Supreme Court. This is not so! As was previously noted, review could easily have been obtained by challenging the validity of the statute on its face or as applied, but was not. Moreover, in Petitioner's petition before the Supreme Court, he sought review on a point totally detached from the issue involved here. A copy of Petitioner's jurisdictional brief in support of his petition is included in Respondent's record at pages 33 through 43.

Respondent wishes to point out that no question was raised in the district court of appeal regarding the existence of probable cause by Petitioner. Therefore the implications and innuendos on page 19 of Petitioner's brief that there is ". . . serious doubt on [sic] whether the police really had probable cause. . ." should be seen for what it really is, to-wit: an attempt to paint the actions of the arresting officers as abusive and unreasonable. Johnny Winters' admission against penal interest rendered him reliable as a matter of law, *United States v. Harris*, 403 U.S. 573 (1971) and supported a finding of probable cause.

Additional facts deemed relevant to a disposition of this petition will be included in the argument portion of this response.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Respondent acknowledges that this Court will ultimately have to decide the abstract question of whether the Warrant Clause applies to arrests in the home, and if so, under what circumstances. Respondent submits, however, that this is not the case that should be utilized to do so.

First, it is beyond question but that the issues were not properly developed at trial thereby affording this Court the opportunity to dispose of the issues upon a record properly developed with that in mind. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Secondly, Petitioner has avoided presenting the issue to the Florida Supreme Court and that Court has not been given an opportunity to re-examine their decision in *Perez* which was decided without the benefit of *Watson* and *Santana*. That Court might well have construed Section 901.15 as being limited to arrests only in public places or where exigent circumstances exist. Before this Court disposes of this issue it should have the benefit of the decisions of the various state supreme courts and the United States Circuit Courts. Thirdly, amd more importantly, the instant arrest was effectuated in the daytime (Resp. R 3), without forcible entry (Resp. R 4) and did not involve any search of the dwelling. Under these circumstances, as contrasted with *Jones v. United States*, 357 U.S. 493 (1958) and *United States v. Killebrew*, 560 F.2d 729 (6th Cir. 1977), the arrest was not unreasonable. This is so because the arrest was for a grave offense (armed robbery) (Resp. R 5), and therefore a basis to believe the petitioner was armed; there was a basis to believe Petitioner was on the premises because it was his residence; and the entry was peaceful and in compliance with statutory authority. *Dorman v. United States*, 435 F.2d 385 (U.S. App.D.C. 1970). Additionally, since there was no search of the

premises, it cannot be urged the arrest was a mere ruse to effectuate an illegal search like that in *Vale v. Louisiana*, 399 U.S. 30 (1970). In short, this case falls within that class of peaceful daytime arrests which have been found not to be unreasonable or violations of the Fourth Amendment. *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973) and *United States v. Hall*, 348 F.2d 837 (2d Cir. 1965), *cert.den.*, 382 U.S. 947 (1965); *Commonwealth v. Boswell*, 372 U.S. 237 (Mass. 1978).

Counsel's reliance upon search and seizure cases totally overlooks the fact that there is a significant difference between the two, *United States v. Hall*, supra, at 841-42 and *People v. Payton*, 408 N.Y.S.2d 395 (N.Y.App.1978). If the officers could have waited outside until Petitioner emerged and then lawfully arrested him, and they surely could, *United States v. Watson*, supra, what was so unreasonable about their proceeding to his home and after being admitted effecting an arrest? In *either* case, the arrest is accomplished without prior judicial approval.

In truth and in fact, a *person* like an automobile is mobile, *United States v. Hall*, supra, at 841, and just as this Court has upheld warrantless searches and seizures thereof based upon statutory authority, *Carrol v. United States*, 267 U.S. 132 (1925) and *Chambers v. Maroney*, 399 U.S. 42 (1970) against a Fourth Amendment challenge, the plethora of statutory authority for arrest without a warrant of persons based upon probable cause should be upheld for the same pragmatic reasons.

This Court has stated that it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant, *Gerstein v. Pugh*, 420 U.S. 103 (1975). It should not do so in this case for there is *nothing* to indicate that it was done in an unreasonable fashion or for illegal purposes.

If anything, it was in the good faith belief that the long-standing statutory law authorized it.

Florida law, although authorizing warrantless arrests of persons do not allow forcible entry into a building, Section 901.19, Florida Statutes, and forbids the search and seizure of items beyond the "immediate control" of the person arrested. Thus the statutes harmonize with *Jones* and *Chimel v. California*, 395 U.S. 752 (1969) and thus satisfy the commands of the Fourth Amendment.

This Court should decline to exercise its jurisdiction to review the judgment and sentence in this case for the record adequately demonstrates that the arrest, unaccompanied by any unlawful search and seizure, was not unreasonable as that term is used in the Fourth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Mr. Michael J. Minerva, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 29th day of November, 1978.

Raymond L. Marky
Assistant Attorney General